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Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES

Edwin Durand, and Madelaine Durand, *Petitioner(s),*

v.

Syed M. Arif, Norman F. Rice, d.b.a North American Technical Trading Co., Inc., Gloria M. Rice, Clifford S. Rice, and Matthew G. Huntley, Esq.,

Respondent(s);

Jerry W. Slusser, James W. Scott, d.b.a Valtec Capital Corp., and Earthco Inc.,

Respondent(s).

On Petition For Writ Of Certiorari
To the Court of Appeal of the State of California
In And For The Third Appellate District

PETITION FOR WRIT OF CERTIORARI

Edwin Durand, Madelaine Durand, *Pro Se Petitioner(s)*
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38 pp

QUESTIONS PRESENTED FOR REVIEW

This case involved certain tort causes of action, and the validity of certain mining claims located on Federal land under the authority of the Department of the Interior, Bureau of Land Management and based on the Federal Code of Regulations, the Federal Mining Law of 1872, and the U.S. Public Law 94-579-Oct. 21, 1976, commonly known as FLPMA, the Federal Land Policy and Management Act. The trial court bifurcated this case, and conducted a bench trial on the Federal question of the validity of the mining claims. After the trial court entered a judgment on the mining claims, it refused to allow a jury trial on Petitioner's tort causes of action, which were not predicated on the mining claim issue, therefore denying Petitioner's Seventh Amendment right to a jury trial and their rights under the Fourteenth Amendment Due Process Clause.

1. Whether a state court has jurisdiction over the validity of Federal mining claims, which were located pursuant to Federal Statutes and Regulations on Federal land under the authority of a Federal agency.

2. Whether a state court can refuse to follow the U.S. and California Constitutions, U.S. Supreme Court precedents, U.S. and California statutes, and also their own Rules of Court and established precedents, and deny litigants their Seventh Amendment right to a jury trial and their rights guaranteed by the Fourteenth Amendment Due Process Clause, all without fear of reversal by use of an unpublished opinion.

Parties Below

Petitioners are Edwin Durand and Madelaine Durand.

Respondents are Norman Rice, Syed Arif, North American Technical Trade Company, Gloria Rice, Clifford Rice, Matthew G. Huntley, Esquire, Norman Rice Enterprises, Jerry W. Slusser, James W. Scott, Valtec Capital Corporation, and Earthco, Incorporated.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edwin and Madelaine Durand respectfully petition for a writ of certiorari to review the judgment in this case of the California Court of Appeals, Third Appellate District.

OPINIONS BELOW

The opinion of the Court of Appeal marked "Not To Be Published" is unreported.(App. A) Petitioner's Petition for Rehearing to the Court of Appeal was denied. (App. B) Petitioner's Petition for Review to the California Supreme Court was denied. (App. C)

JURISDICTION

The judgment of the Court of Appeal of California, Third Appellate District, was filed on June 24, 2002, in an unpublished opinion. The Court of Appeal denied a timely Petition for Rehearing on July 22, 2002. A Petition for Review was filed with the California Supreme Court on August 7, 2002, and was denied September 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS & U.S.C. CODES INVOLVED

The relevant portion of the due process clause, U.S. Constitution, 14th Amendment is: "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

The relevant portion of the U.S. Const. 7th Amendment

is: "the right of trial by jury shall be preserved..."

The relevant portion of the California Constitution, Article 1, Section 16, is: "Trial by jury is an inviolate right and shall be secured to all..."

U.S. Constitution, Article III Section 2
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Business and Professions Code §§ 6068(d)(g), 6106

STATEMENT OF THE CASE

1. BASIS FOR FEDERAL JURISDICTION

This case was filed in the Superior Court of Lassen County located in Susanville, California. This case involved the validity of mining claims located on Federal land pursuant to Federal Statutes, and the Code of Federal Regulations. The Superior Court of Lassen County lacked jurisdiction to proceed to judgment. This case also involves violations of the Petitioners Civil Rights, inviolate right to a jury trial on a legal/factual issue, and violations of Due Process as guaranteed by the Fourteenth and Seventh Amendments to the United States Constitution.

In California the question of Jurisdiction is never waived and can be introduced at any time including in a petition for Supreme Court review. Throughout the

proceedings Petitioners consistently stated the validity or invalidity of the mining claims was based on Federal law. California Mines & Mining statutes have been mostly repealed. The Federal "Mining Law of 1872" as amended is the controlling law for all Federal/BLM public lands and mining claims under Title 43 CFR Parts 2300, 3700, 3800, as well as precedent U.S. Supreme Court and Circuit Court decisions. The question of Federal Jurisdiction was raised in the Appellant's Petition for Rehearing and again in the Petition for Review filed with the California Supreme Court, which cited U.S. Constitution, Article III, Section 2, U.S.C. Title 28, Part IV, Chapter 85, Section 1331 and Chapter 89, Section 1441(b). (App F-25) Both Petitions were summarily denied without factual findings, even though California Supreme Court well-established precedent law states the issue of jurisdiction **must be addressed**.

It is common knowledge that the Seventh Amendment guarantees a right to a jury trial and the Fourteenth Amendment guarantees Due Process of law. Petitioners have continuously throughout this case requested a jury trial, but have been continuously denied their right. Although Petitioners did not specifically cite the Seventh Amendment, they did cite the California Constitution Article 1, Section 16, which states: "Trial by jury is an inviolate right and shall be secured to all..."

The first time the Fourteenth Amendment was specifically stated was in Petitioner's "Appellant's Opening Brief," which stated: "Durand filed their motion per CCP § 473 and 592 in order to preserve their rights to have all issues properly adjudicated.... and [the trial court] has also denied them their right of due process under federal (U.S. Const., 14th Amend.) and state (Cal. Const., art. I, 7) Constitutions." The opposing parties and the state courts have had ample opportunity to address Petitioners rights to a jury trial and due process.

Since the state court lacked jurisdiction over federal issues, the "Judgment" entered by the trial court pertaining to the validity of the mining claims, is void, and so is every other order or judgment, which is predicated on that void judgment, such as the order denying Petitioner's right to a jury trial on their tort causes of action.

2. FACTUAL SUMMARY

On February 5, 1997, Syed Arif and Norman Rice filed a SLAPP suit (Strategic Lawsuit Against a Private Person) against Edwin Durand and American Pozzolan Corporation. American Pozzolan Corporation was dismissed from the case, yet Respondent's attorney, Mr. Craig Kellison, included American Pozzolan Corporation in the "Judgment" and the **trial court refused to remove it.** The action was filed in order to coerce Petitioner to stop testifying to the illegal activities of the Respondents. The complaint requested quiet title to mining claims located on federal land overseen by the Bureau of Land Management. The Federal law requires a deed to transfer title. Respondent's only evidence of title to the mining claims known as the Ironclouds, R&Rs, and Native Americans was an admittedly forged "To Whom It May Concern" letter, which Respondent's had filed with the BLM office in Sacramento. At a hearing on June 20, 1997 in sworn testimony, Mr. Robert Novak, the alleged original locator, stated in a spontaneous exclamation that he had **never transferred title** to the Respondents. (R.T. hearing June 20, 1997, p. 144)

The Respondent's complaint also alleged five (5) other Causes of Action, all of which were abandoned by the Respondents once the Respondents realized these causes would have to be adjudicated by a jury, which they could not control, although "jury-rigging" is allegedly not uncommon in the Lassen County Superior Court. *See People*

v. Paul Berry III, Sacramento Bee, July 29, 1999 by correspondent Little.

Petitioners, Edwin and Madelaine Durand, filed a Cross-Complaint on April 17, 1997 and enjoined Mr. Matthew Huntley, Esq., Mr. Jerry Slusser, and his corporations Valtec Capital Corporation and Earthco, among others.

Petitioner filed the Second Amended Counterclaim Complaint on June 5, and his Supplemental Pleading on June 9, 1997 as ordered by the trial court, which included six (6) causes of action: Intentional Interference with Economic Relations and Injunctive Relief, Libel, Slander of Title, Quiet Title, Trespass, and Attorney Fees and Legal Costs. These pleadings, along with the First Amended Complaint, clearly stated the tort causes of action perpetrated by the Respondents against the Petitioner.

In 1991, Respondent Norman Rice entered into a business relationship with Petitioner in which he agreed to secure funding for Petitioner's business. Under a Fiduciary Duty and a Duty of Confidentiality, Respondent fraudulently induced Petitioner to turn over Petitioner's research, intellectual property, business plan and business relationship information, then breached the agreement, and used Petitioner's information to get himself funded, cutting Petitioner out of the business. Petitioner discovered that Mr. Rice had made a backdoor agreement with Mr. Swickard, owner of the Mapes ranch, and Mr. Novak, alleged original locator of the "Ironcloud," "R&R," and "Native American" claims. Later, Petitioner found the Novak claims were legally **invalid** and that the claim area was open for location. Petitioner properly located the Sierra Lady mining claims pursuant to Federal law.

Respondent has continued to the present time, his malicious acts of economic interference, theft and fraud, and has used several different artifices to try to illegally appropriate Petitioner's later research and development.

These acts as perpetrated by Respondent have gone unabated to the present day, since the trial court has refused to allow Petitioner's tort causes of action to be adjudicated by a jury.

Respondent Jerry Slusser was convicted of multiple frauds by the Commodities Futures Trading Commission. (See *Slusser v. Commodity Futures Trading Commission* (2000) 210 F.3d 783. [7th Cir. 2000]) Mr. Slusser's longtime partner is Mr. Tom Nevis, who was convicted for defrauding multiple Savings and Loans of approximately One Hundred and Twenty Million Dollars ($120 million). (See CR-94-169 DFL U.S.D.C. [E. D. Calif.] and Civ-S-95 2098 DFL U.S.D.C. [E. D. Calif.]) Another associate of Mr. Slusser, is a Mr. Mel Amaral, who was convicted of embezzlement from the U.S. Government. The Vice President of Mr. Slusser's Earthco Corporation, is Mr. Norman Jenson, a disbarred Nevada attorney convicted of possession and intent to distribute cocaine and conspiracy to defraud the IRS. U.S. District Court California, Case CR-87-0546 9/17/90.

Respondent Slusser et al. obtained confidential material, which Petitioners had given to Lassen County as part of an application to obtain a CBDG grant.

Petitioner was in negotiations with Mr. Francis Brown, to obtain funding to develop Petitioner's mining business and private property. The business with Mr. Brown also included Petitioner building Mr. Brown a business complex along with engineering work, since Petitioner is also an Engineer and California General Contractor.

Within two days of Mr. Brown contacting Mr. Simon of the Lassen County Planning Department, Respondent Slusser contacted Mr. Brown, setting up a meeting. During this meeting Respondent defamed Petitioner. Immediately upon Respondent leaving this meeting, Petitioners and witnesses read the Respondent's business plan, which had

been left for Mr. Brown to look through, and found it contained Petitioners brochure along with a copy of an article from the Small Business Monthly promoting Respondents product using Petitioner's research verbatim, constituting fraud and theft of intellectual properties. The purpose of Respondent's meeting with Petitioner's funding source was strictly to interfere with Petitioner's business and slander Petitioner's business reputation.

The use of Petitioner's brochure and name in the Respondent's business plan has a two-fold effect. To those who know the fraudulent business practices of the Respondents, the inclusion of the Petitioner's research and intellectual property make it appear that Petitioners were a part of the Respondent's fraudulent activity. Petitioner's have actually been accused of being the "new front men for the old crooks." To those who do not know of the Respondent's background, the inclusion of the technical data produced by Petitioner makes Respondent appear legitimate. However Respondents have not changed their ways since their convictions. Such association that this inclusion perpetuates has been, is, and continues to be devastating to the Petitioner's business.

Petitioner's tort causes of action were never predicated upon the quiet title to some mining claims and this fact was made perfectly clear, stated and restated numerous times to the lower courts.

Shortly after the hearing on June 20, 1997, Plaintiff's first attorney, Mr. Bert Guerra, abandoned their case once he realized the Plaintiff's claims were all false. He was replaced by Mr. Craig Kellison, an attorney from Susanville, California, and a U.S. Magistrate, appointed by Chief United States District Judge William Shubb of Sacramento. Since Mr. Kellison's duties as a U.S. Magistrate includes cognizance over federal BLM land in all of Northern California, where the mining claims in question

were located, he has a direct conflict of interest, especially since the "Judgment" on the Quiet Title to the mining claims, written solely by Mr. Kellison, egregiously violates the Code of Federal Regulations, federal law, and the Mining Law of 1872, which Mr. Kellison is sworn to uphold. (According to the Statement of Decision written by Mr. Kellison it is now legal to use a forged letter to transfer title at the BLM.)

The first judge on the case was Presiding Judge Stephen D. Bradbury, former law partner of Mr. Craig Kellison. Judge Bradbury was the president of the California Judges Association for the term of September 23, 2001 to October 12, 2002, and is a member of the Trial Court Presiding Judges Advisory Committee. Judge Bradbury recused himself as he had personal knowledge of the real property and mining claims involved in the case.

Judge Guy Martin Young was assigned to the case, had presided over several hearings, and had made numerous decisions in law and fact. However, when Judge Young made a statement that, based on the testimony and evidence, Petitioner would prevail, Mr. Matthew Huntley, Esq., a client of Mr. Kellison and was in default, filed a peremptory challenge, without notice to Petitioner, and Judge Young suddenly disappeared. (R.T. 11/19/97, p.30-31)

Petitioner filed a peremptory challenge against the next assigned judge, Judge Ridgely L. Lazard, because of his known close relationship with Mr. Kellison. At the hearing Judge Lazard stated, "Gee, Craig, I guess I can't help you out today because they (Petitioners) threw me off."

Judge Young had already stated the case was to be bifurcated with Quiet Title to be heard first and Petitioners tort causes of action to be heard separately. Petitioner's tort causes of action were not predicated upon the outcome of the quiet title. (A.A. Vol. 7, 1638)

Judge Noel Watkins presided over the hearing on March

25, 1998, wherein he bifurcated the case, with the Quiet Title to be heard first and Petitioner's tort causes of action to be adjudicated in a separate jury trial. (A.A. Vol. 7, 1843)

Municipal Court Judge Larry Dier was then assigned to the case for all purposes. Judge Dier was the sixth judge on this case. As of January 2002, Judge Dier is now a member of the Trial Court Presiding Judges Advisory Committee, along with Judge Bradbury. Judge Dier's prejudice against Petitioner was blatant and his close relationship with Mr. Kellison was clear, as evidenced by statements made in subsequent hearings and documents.

a. Witness Tampering by Respondents' Attorneys Condoned by Trial Court

As stated above, Mr. Novak had stated in sworn testimony he had never given title to Respondents Norman Rice or his partner, Syed Arif. Respondents were well aware that Petitioners had irrefutable evidence that the Respondent's only claim to title of the mining claims was a forged letter. Respondents, led by Mr. Kellison, devised a plan in which they would be able to discount the spontaneous exclamations of Mr. Novak in the June 20, 1997 hearing. Respondents could have depositioned Mr. Novak for a nominal amount at any time in the preceding year and a half. But instead, Mr. Kellison paid Mr. Novak Five Hundred Dollars ($500.00) to leave his residence in Fallon, Nevada, which is 60 miles west of Reno, Nevada, where the Petitioners reside, and go to Dallas, Texas, for a deposition. Respondents counted on the fact that Petitioners could not afford to fly to Dallas, Texas for the deposition and therefore would not be able to cross-examine Mr. Novak. Mr. Kellison, Mr. Rice, and Mr. Davis

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A.A. is an abbreviation for Appellant's Appendix filed with the Appellate Court. The references are made to show that the statements are supported by documented evidence.

spent three days in Texas for a one hour deposition, where much of the time was spent where the witness, Mr. Novak, was staying at that time. Not surprisingly, the coached and leading testimony in the deposition suddenly contradicted Mr. Novak's prior spontaneous, sworn testimony.

Petitioner had filed for a Protective Order to stop this deposition, but the trial court refused to rule on the motion. (A.A. Vol. 8 1925, 1929:20-1930:11, 1951)

The trial court allowed Mr. Novak's deposition to be read into the Record in its entirety even though Petitioners had not been able to cross-examine, but refused to allow the full text of the sworn testimony given at the hearing of June 20, 1997, by Mr. Novak, which was spontaneous, uncoached, and helpful to the Petitioner's case.

After trial on the bifurcated issue of quiet title, the trial court granted Respondents' motions for costs. Petitioners moved to tax the costs, and it was shown that Mr. Kellison was including the payment he made to Mr. Novak for his "travel expenses" from Fallon, Nevada to Dallas, Texas. (A.A. Vol. 12, p.3252) After showing the Court irrefutable evidence of the witness tampering perpetrated by the Respondents and their attorneys, especially Mr. Kellison, the Court removed the $500.00 payment to Mr. Novak from the costs. However, the Court refused to remove the $1,839.18 in costs, which included a movie and alcohol, for Mr. Kellison's and Mr. Rice's travel expenses to Texas. (A.A. Vol. 12, Page 3252) The trial court also refused to remove an expert witness fee for Mr. George Wickman, a resident of Susanville and friend of Mr. Kellison, even though such inclusion was in violation of California Civil Procedure § 1033.5. (A.A. Vol. 12, p.3279)

Based on the fact that the Respondents continuously refused to abide by the Rules of Discovery, Petitioners filed three (3) Motions to Compel. Again the trial court refused

to rule. Judge Dier did not show up for the first hearing set to hear Petitioner's Motions to Compel, and vacated the second hearing without cause, in a letter to Mr. Kellison, which stated: "This is to confirm my conversation with you..." (A.A. Vol. 10, 2609) Petitioners requested a ruling on the Motions to Compel at the beginning of trial, but Judge Dier refused to make a ruling stating:

> "...If I made a ruling favorable to the Durands [Petitioners] today, I'm not sure how the opposing parties would respond to it. So what I'm going to do is as the piece of evidence comes up or the absence of a piece of evidence is in issue, then we'll discuss what kind of remedies there are for that. There are a host of possibilities." (R.T. Trial, Vol. 1, p.14, L6-11)

At the beginning of trial on October 14, 1998, Judge Dier stated he was proceeding on the Petitioners cross-complaint rather than the Respondent's complaint. Unbeknownst to the Petitioners at the time, this completely prejudicial act shifted the burden of proof from the Plaintiffs/Respondents to the Petitioners. Again this was a premeditated act, since the Respondents could never have proved title to the mining claims based on their sole evidence, the forged letter.

On March 3, 1999, after trial on the bifurcated quiet title issue only, the trial court entered a Tentative Decision stating:

> "It is tempting to try to write a decision in this case in such clear language and with such straight forward, tight logic that the parties defendant and cross complainant could understand why their positions are untenable. Sadly, it is doubtful that that could be done. A reading of the post trial briefs shows how frustrating (Kellison and Davis) and futile (Durand Supplement One) such an attempt would be."(A.A. Vol. 12, 3100-3101)

On March 23, 1999, Petitioners filed a Request for a Statement of Decision, which reiterated the fact that there were still unadjudicated causes of action. (A.A. Vol. 12, 3169:5-17) The trial court ordered Mr. Kellison to prepare a proposed Statement of Decision, since he, himself, was unable to prepare a decision in clear, straight forward, and logical language.

b. Statement of Decision Substantiates Petitioner's Tort Causes of Action Were Never Adjudicated

The Statement of Decision and the "Judgment For Permanent Injunction and Determining Right of Possession to Mining Claims," both written by Mr. Kellison, were filed on April 28, 1999. (App G & App H) The Statement of Decision clearly stated that Petitioners tort causes of action were left unadjudicated:

> "This issue is also difficult for the Court to respond to. Apparently, the Durands maintain that the Court should sympathize with the notion that they were somehow taken advantage of by some or all of the Plaintiffs and Cross-Defendants. Here, the Plaintiffs and Cross-Defendants presented a prima facia case establishing their possessory interest to each and all of the Ironcloud, Jennifer, Native American and R&R claims. **Thus, the issue of who-did-what-to-whom would appear to be outside of the scope of the narrow issue of quieting title that was presented to this Court for consideration."** (App G -24)(Emphasis added)

Entering a "Judgment" on a bifurcated issue before all issues are adjudicated is in violation of the California Rules of Court § 232.5. The only procedure available under law for the trial court was to enter a Tentative Decision until all issues are adjudicated. This fact was brought to the attention of the trial court in the Petitioner's Motion for a

New Trial. (A.A. Vol. 12, 3210, 3211, 3212, 3222, 3227) The Motion was denied on August 20, 1999, without any reference to the unadjudicated tort causes of action, therefore leaving the Petitioners in a "Catch 22." California law states that appeals can only be from "one final judgment." All issues must be adjudicated between the parties before an appeal can be filed. Judge Dier left Petitioners without the "one final judgment" necessary for appeal, since the Petitioners tort causes of action were still unadjudicated.

Petitioners timely filed two Motions pursuant to CCP § 473 Relief from Judgment Taken by Mistake, and CCP § 592 Jury Trial, to obtain their Constitutional right to a jury trial on an issue of fact.

Motions per CCP § 473 are commonly used by attorneys to gain relief from void judgments, and judgments based on mistake, inadvertence, surprise, or excusable neglect. This Section gives the trial court the power to vacate void judgments, such as that in the Petitioners case, where the judgment was prematurely entered before all issues were adjudicated.

On February 23, 2000, not only did the trial court deny Petitioners motions, but also the trial court granted Mr. Kellison's motion deeming Petitioners to be vexatious litigants subject to a prefiling order. (App. D-2) Mr. Kellison's motion was totally devoid of evidence and case law, which could sustain such a designation, and was nothing more than a malicious, perverse, oppressive act of coercion and harassment by Mr. Kellison and the trial court, aimed at the Petitioners to scare Petitioners from filing an appeal. The Appellate Court reversed, stating: "No evidence supports the trial court's determination the Durands were vexatious litigants under subdivision (b)(2)." (App. A-12)

c. Respondents File Falsified Documents With the Appellate Court

Petitioners filed their Notice of Appeal on April 13, 2000. The case was fully briefed on April 23, 2001. Petitioners filed a Motion for Sanctions against Respondents' attorneys, Mr. Kellison and Mr. Davis, which included irrefutable, uncontroverted evidence of multiple Penal Code violations perpetrated by these attorneys on the Appellate Court level.

Respondents based their Appellate briefs on a document titled "Findings and Order After Hearing," which they allege was signed June 22, 1998. This document allegedly dismissed Petitioners tort causes of action. This document **never existed** until after the trial court had denied Petitioners CCP § § 473 and 592 motions on February 23, 2000. Petitioner's evidence was clear, convincing, and unequivocal, proving this document was more fraudulent, falsified evidence. Furthermore, Mr. Kellison falsified another document in his Respondent's brief, committing more Penal Code violations.

To anyone who is unbiased and looking for the truth, the evidence is beyond all reasonable doubt.

At the hearing on the CCP § § 473 & 592 motions on November 29, 1999, after Petitioners presented the facts that their tort causes of action had not been adjudicated and that they had a right to a jury trial on these issues, the trial court asked Mr. Kellison: "Mr. Kellison, was it your understanding that the Court intended to and did in fact dispose of all of the case with the decision that was entered?" MR. KELLISON: "Yes." THE COURT: "And the judgments. That's your position?" MR. KELLISON: "Yes." THE COURT: "So you would therefore take the position that I don't have jurisdiction now?" MR. KELLISON: "Yes."(R.T. hearing 11/29/99, 29:6-15)

Once Mr. Kellison realized the Statement of Decision he

wrote specifically stated that the tort causes of action were never considered, let alone decided, and the "Judgment," which gave title to some of the mining claims to the Petitioners, never mentioned Petitioners tort causes of action, he realized something had to be done and, viola! suddenly an order dismissing Petitioners tort causes of action appeared. The evidence, which is well documented in Petitioner's Reply Brief and Petitioner's Motion for Sanctions, is irrefutable that that "Order" never existed:

1. There was no Motion or Notice of Motion to Dismiss. (A.A. Vol. 1, p.1)
2. There was no discussion during the March 25, 1999 hearing of any motion to dismiss.
3. There was nothing in the minute order dismissing Petitioner's tort causes of action. (A.A. Vol. 7, p.1838)
4. No proposed order was sent to Petitioner.
5. **No order was ever entered in the Docket or the Clerk's register.** (A.A. Vol. 1 p.1)
6. **No "Order" was ever served on Petitioner dismissing their tort causes of action.** (During oral argument Justice Nicholson specifically asked Mr. Kellison, several times, if there was anything in the Record to prove this alleged "Order" was ever served on the Petitioners, and Mr. Kellison stated there was not.)
7. There were numerous times when the Respondents or the trial court could have referred to this so-called "Order" including the hearing on the motion for a jury trial in July, 1998, the trial itself, the post-trial briefs, the Statement of Decision, the hearing and opposition papers to Petitioners motion for a new trial, the hearing and opposition papers to the CCP § 473 and CCP § 592 motions. **It was never mentioned!**

The document had been stamped by Ms. Suzy Faulkner, clerk to Judge Bradbury, former law partner of Craig Kellison. Petitioners found the document stuck in the file

on April 13, 2000, when they filed their Notice of Appeal. That was the first time they were allowed access to the file, since up until that point the file had been in Ms. Faulkner's possession, and she had on numerous occasions refused Petitioners access.

d. Appellate Court Condones Respondents' Attorneys Penal Code Violations

The alleged Penal Code violations perpetrated by the Respondents and their attorneys Mr. Kellison and Mr. Davis include perjury, subornation of perjury, making of a false document, uttering such false document to a court of law, preparing and offering false evidence, violations of Title 18 U.S.C. 1001, along with the violations of the Business and Professions Code, which amounts to calculated malfeasance.

However, in the Appellate Court opinion the Court stated: "...the validity of this order is unclear..." One thing is clear, since these illegal acts were committed by a politically connected attorney, they and the evidence have been completely swept under the carpet in the Appellate Court's unpublished opinion. It is no wonder the general public has zero confidence in the "Justice" system.

Attorneys routinely file CCP § 473 motions. However, the trial court sanctioned Petitioners for filing their CCP § § 473 and 592 motions, which was affirmed by the Appellate Court.

Petitioners filed for sanctions in the Appellate Court based on the Respondent's attorneys alleged Penal Code and Business & Professions Code violations. The Appellate Court's opinion summarily denied Petitioner's motion without comment, citing *In re Marriage of Flaherty* (1982) 31 Cal.3d 637. The California Supreme Court in *Flaherty ibid,* states: [Sanctions] "...can serve the important purpose of penalizing the most egregious conduct without deterring

valid appellate claims." "...a few extreme examples demonstrate the necessity for a deterrent." It is appalling that the California Appellate Court obviously thinks that the above Penal Code and Business & Professions Code violations, allegedly perpetrated by Mr. Kellison and Mr. Davis, do not come up to the level of "most egregious conduct," but the Petitioner's fighting for their Constitutional rights does.

Since the Appellate Court found that the Respondents' briefs were **completely without merit** and that the so-called "Order" was **"unclear,"** the Appellate Court had to find another basis for affirming the trial court's (Mr. Kellison's) denial of the Petitioner's right to a jury trial. It did so by **presuming** the trial court had determined the Petitioner's causes of action had "become moot upon its resolution of the quiet title action."

It was clearly shown to the Appellate Court that the trial court had never considered, let alone determined, Petitioner's tort causes of action, as evidenced by the Statement of Decision. (App G-24) The Appellate Court had to violate California Rules of Court Rule 52, CCP § 634, and extensive case law, which **prohibits** the Appellate Court from presuming an event occurred when the Record clearly shows it did not. The Appellate Court has hidden these violations by the use of the "unpublished opinion."

Petitioners also demonstrated that the trial court lacked jurisdiction over the validity of Federal mining claims, since the question in Petitioner's Cross-Complaint, which was what the trial court proceeded on at trial, deals with Federal land, Federal Bureau of Land Management mining claims, the Code of Federal Regulation, the United States Code, the Mining Law of 1872, and the Federal Land Policy and Management Act. Any "Judgment" where the court lacks jurisdiction is void. Any subsequent ruling based on a void judgment is also void.

The Petitioners have an inviolate right to a jury trial on an issue of fact, guaranteed by the California Constitution and the U.S. Constitution, Seventh Amendment, along with a right of Due Process, as guaranteed by the Fourteenth Amendment. Petitioners have been denied their Constitutional rights.

REASONS FOR GRANTING THE PETITION

1. California Appellate Court's Decision Violates the U.S. Constitution Seventh and Fourteenth Amendments and U.S. Supreme Court Precedents

It is common knowledge that the Seventh Amendment of the U.S. Constitution along with Article 1, Section 16 of the California Constitution preserves an inviolate right to a jury trial. Also, the U.S. Constitution Fourteenth Amendment, and California Constitution Article 1 Section 7 guaranties the right of Due Process. In the present case the California courts have trampled on the U.S. and California Constitutions, and have completely ignored well-established U.S. Supreme Court precedent. Petitioners had continuously requested a jury trial.

In *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 110 S.Ct. 1331 (1990) Justice Marshall, one of the most respected Justices, stated, in pertinent part: "The Seventh Amendment preserves the right to trial by jury in "Suits at common law." "When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact.... only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to jury trial of legal issues be lost through prior determination of equitable claims."

As already noted, the trial court bifurcated the case between quiet title and Petitioner's tort causes of action,

tried the issue of the validity of the federal mining claims, without jurisdiction to do so, and entered a "Judgment For Permanent Injunction and Determining Right of Possession To Mining Claims" on April 29, 1999 in violation of the California Rules of Court, Rule 232.5. (App H) Subsequently, the trial court arbitrarily refused to allow a jury trial on Petitioner's tort causes of action, which were not predicated on the quiet title of some mining claims, thus violating the Petitioner's Constitutional Rights to a jury trial and Due Process.

2. Trial Court Was Barred From Entering Judgment Until All Issues Were Adjudicated

California Rules of Court, Rule 232.5, bars a trial court from filing a final judgment in a bifurcated trial, until all issues between the parties have been adjudicated.

> Rule 232.5 states in pertinent part: "When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried...**but no proposed judgment shall be prepared until the other issues are tried,** except when a.... separate judgment may otherwise be properly entered at that time." (Emphasis added)

The only supporting case law for this Rule where a separate judgment is allowed to be entered, is in a liability/damages situation. That is not the case in the present action. Petitioner's tort causes of action were **not** predicated on the bifurcated quiet title issue, and, according to Justice Marshall, even if they were, the right to a jury trial "remains intact."

It was brought to the trial court's attention, in the Request for the Statement of Decision, that the Petitioner's tort causes of action had not been adjudicated.

The trial court **never considered or determined** the Petitioner's tort causes of action, as evidenced by the Statement of Decision filed April 28, 1999. (App G-24)Then, after the Petitioner's moved the trial court for a jury trial on their tort causes of action, the trial court suddenly changed it's story in it's "Order" filed February 23, 2000, stating: "the Durands having lost on the issue of ownership of the disputed claims, there is nothing left to litigate." (App D-2)

It is well established that a viable cause of action cannot disappear suddenly without Due Process of law as guaranteed by the Fourteenth Amendment. The Record on Appeal contained everything that had occurred between the filing of the Statement of Decision and the filing of this "Order," and the Record is completely devoid of any document, motion, order, transcript, or hearing, which could be construed as a change from the "never considered" status to they no longer exist.

The California Court of Appeal's opinion stated: "Here, the trial court determined the Durands' remaining causes of action became moot upon its resolution of the quiet title action. As a result, the trial court concluded it had nothing left to adjudicate, and it properly entered judgment at that time as allowed by rule 232.5." **This statement is false and in direct conflict with the trial court's Statement of Decision.**

The California Appellate Court's opinion is devoid of any evidence to substantiate its presumption, that the trial court had determined Petitioner's tort causes of action had become "moot," since **there is no evidence** to support such a presumption.

California statutes and well-established precedent case-law bar the Appellate Court from making such a presumption, when in fact no such determination or ruling was ever made.

California Civil Procedure, § 634 states:

"When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, **it shall not be inferred** on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."(Emphasis added)

Clearly, in this case, the Statement of Decision did not resolve the controverted issues in Petitioner's tort causes of action, and, as such, the Appellate Court is completely barred from presuming it did.

Further, California Rules of Court, Rule 52, states in pertinent part:

"If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal..."

The Record was complete and the only documentation that the Respondent's added were documents proven, unequivocally, to be **falsified** by the Respondents. The multiple Penal Code violations along with the Business and Professions Code violations are extensive and were all completely ignored by the California Appellate Court.

3. Appellate Court Had To Fictionalize the Record in Order to Affirm the Trial Court Decision

Most importantly, Petitioners argued that under CCP § 473(d) the trial court had the power to "set aside any void judgment or order."

Why was the "Judgment" void? For two reasons. Prematurely entering a judgment in a bifurcated trial before all issues were adjudicated, as in the present case, was strictly prohibited by Rule 232.5. Secondly, since the validity of federal mining claims was a federal question dealing with Federal laws, the trial court had no jurisdiction over those Federal matters. Any judgment from a court lacking jurisdiction is void.

Petitioners argued that since their tort causes of action were still unadjudicated, the "Judgment" of April 28, 1999 was not a final judgment, that the trial court was barred from entering it as a final judgment and therefore the "Judgment" was void. According to California Rules of Court Rule 232.5 it could only be considered a tentative decision. This was continuously brought to the attention of both the trial and appellate courts.

The Appellate Court never responded to Petitioner's argument, based on CCP § 473(d) because the only response available would have been to reverse and remand.

However, if the Petitioners were allowed to receive justice under the law, it would be impossible to sweep Respondents attorney's, especially Mr. Craig Kellison's, alleged illegal activity under the carpet. This politically connected attorney would have to face prosecution, disbarment, and impeachment as a U.S. Magistrate, based on malfeasance and moral turpitude, and, if there is any justice, be required to spend several years in jail. The only result available, since the Respondents had no legal basis which would uphold the trial court's violations of the Petitioner's rights, would be for the Appellate Court to **fictionalize the Record**, find against Petitioners, ignore both the U.S. and California Constitutions and the U.S. Supreme Court precedents, and bury it all in an unpublished opinion, leaving Petitioners practically no chance of reversal of the arbitrary violations of Petitioner's

Civil Rights.

Simply said, if a court has not considered a tort cause of action, it therefore has not determined that cause of action. If it has not determined a cause of action, the cause of action still stands unadjudicated. If a Record clearly shows that the trial court has refused proper adjudication of a tort cause of action by a jury trial, the Appellate Court is **barred from fictionalizing** a reason for the arbitrary, illegal refusal to allow a jury trial. Only in the practice of voodoo law, can a viable cause of action **go poof and suddenly disappear!**

In *Lytle v. Household Manufacturing, Inc., supra, 494 U.S. 545, 110 S.Ct. 1331, p. 1336,* Justice Marshall went on to say: "It would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim."

No evidence exists that supports the **fictional rationalization** that the Petitioner's tort causes of action were, without notice, suddenly "moot," especially since the Petitioner's tort causes of action, which were independent of the quiet title, could have been brought in a separate lawsuit. Also, what the trial court forgot and the Appellate Court refused to acknowledge was the fact that the Petitioners still have mining claims. According to *Lytle v. Household Manufacturing, Inc., supra, 494 U.S. 545, 110 S.Ct. 1331, p.1337,* which states: "See *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160, 84 S.Ct. 273, 11 L.Ed.2d 261 (1963) *(per curiam)* (reversing trial court's decision to try equitable claims first and thereby to bar jury trial on legal claims that relied on the same facts)," even if Petitioner's tort causes of action totally relied on the ownership of the mining claims, the trial court cannot refuse to allow a jury trial on the legal issues. The fact remains that the lower courts violated both

the U.S. and California Constitutions, and U.S. Supreme Court precedents, as well as the California Rules of Court, when it denied Petitioner's Constitutional right to a jury trial and Due Process.

Furthermore, *Lytle, supra 494 U.S. 545, 110 S.Ct. 1331, p. 1337*, states: "Our conclusion is consistent with this Court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues...**we have reversed and remanded each case in its entirety for a trial before a jury.**" (Emphasis added.)

4. Appellate Court's Opinion Is Contrary To Its Own Decision In An Earlier Case

CCP § 473(b) states in pertinent part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

The California Appellate Court stated that the trial court had no discretion but to deny Petitioner's Motion per CCP § 473, since Petitioners had failed to argue their loss of a jury trial was based on their own mistake, inadvertence, surprise, or excusable neglect.

The case used by the Appellate Court was only one of two cases, which stated the trial court had "no discretion," in an incredibly extensive amount of precedent case law pertaining to CCP § 473 motions. Case after case stated the motion should be granted except for the most egregious acts causing inexcusable neglect. California Supreme Court decisions pursuant to CCP § 473 state that if there is **any doubt**, that the motion **must** be granted in order to meet the ends of substantial justice. "The trial court's discretion is not unlimited and must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."(*See Elston*

v. City of Turlock (1985) 38 Cal.3d 227, 233, 695 P.2d 713, 211 Cal.Rptr. 416)

In fact, just a few months before the present opinion was filed, this same Appellate Court reversed a lower court's denial of a CCP § 473 motion, even though neither the appellant nor his attorney ever admitted to mistake, inadvertence, surprise, or excusable neglect. "Because neither declaration contains any sworn admission of mistake, inadvertence, surprise, or error, Pietak has not demonstrated that he is entitled to relief..."*State Farm Fire & Casualty Company v. Pietak, (2001) 90 Cal.App.4th 600, 109 Cal.Rptr.2d 256.*

According to the case law used by this same Appellate Court in the present case, without an admission of mistake, inadvertence, surprise, or excusable neglect the court has "no discretion" but to deny the motion per CCP § 473. However, in *State Farm Fire & Casualty Company v. Pietak, supra, (2001) 90 Cal.App.4th 600,* the Appellate Court reversed the denial and remanded for a trial. The decision in the present case is directly contrary to the decision in *State Farm Fire & Casualty v. Pietak, ibid.*

How can an Appellate Court rule one way one day and then exactly the opposite just a few months later? It's simple. Do it in an unpublished opinion.

5. The Sanctions Granted Against Petitioners Violated the 14th Amendment

A motion pursuant to CCP § 473 is specifically used to relieve a party of a dismissal, which was entered without their knowledge. The statute allows a party to file for relief within six months after finding the default or dismissal. Had the Petitioners actually been served with an order stating their tort causes of action were dismissed, they would have been able appeal that decision. However, the trial court **never dismissed** their tort causes of action, **never**

noticed the Petitioners that their tort causes of action no longer existed, and as such the trial court violated the 14th Amendment guarantying Due Process.

The prejudice of the Appellate Court against the Petitioners is extremely clear, as evidenced by the section of the opinion pertaining to the sanctions. The Petitioners were sanctioned by the trial court in the amount of $2,000.00 based on the Petitioner's filing their CCP § 473 motion.

The trial court granted sanctions under CCP § 128.5 and CCP § 128.7. (App D-2) The trial court acted beyond its jurisdiction since CCP § 128.5 pertains specifically to cases where "the actions or tactics arise from a complaint filed, or a proceeding initiated, **on or before December 31, 1994.**" The present case was filed February 5, 1997. Accordingly, reversal was warranted.

As to the sanctions per CCP § 128.7, the trial court is required to support the granting of sanctions with specific factual findings setting out the misconduct being sanctioned and the basis for the amount of sanctions. CCP § 128.7(e) states: "when imposing sanctions, the court **shall** describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed." The trial court made no effort to abide by the statute, and accordingly, reversal was warranted.

CCP § 128.7(c)(1) states: "A motion for sanctions under this section shall be made separately from other motions or requests..." Mr. Davis never filed a "motion" for sanctions, he tagged a "Request for Sanctions" on to his "Opposition" to Petitioner's CCP § § 473 and 592 motions. Accordingly, reversal was warranted.

Under CCP § 128.7, a trial court cannot arbitrarily grant sanctions without a 30 day notice, whether it is based on a motion by the opposing party or by the court itself. This is called the "safe harbor" provision, which is well-

documented in case law. Mr. Davis' "request" was pursuant to CCP § 125.8, a non-existent statute. The trial court granted him sanctions under CCP § 128.5, a statute the trial court was barred from using, and CCP § 128.7 in violation of that statute's "safe harbor" provisions.

> "Notice that sanctions were sought under section 128.7 was not sufficient to warn *Levy* or *Guy* that sanctions might be awarded under section 128.5. Therefore, the order imposing sanctions against them **must be reversed**." (Emphasis added) *In re Marriage of David Reese and Joanne Guy (1999) 73 Cal.App.4th 1214, 87 Cal.Rptr.2d 339 at p. 343[1].)*
>
> "Adequate notice that sanctions are being considered is mandated by statute and the due process clauses of the federal (U.S. Const., 14th Amend.) and state (Cal. Const., art, I, § 7." *In re Marriage of David Reese and Joanne Guy, supra, (1999) 73 Cal.App.4th 1214, 87 Cal.Rptr.2d 339 at p. 343[4].)*

Accordingly, in the present case, reversal was warranted.

In order for the Appellate Court to affirm the trial court's sanctions, the Appellate Court again had to **fictionalize the Record**.

In its opinion, the Appellate Court stated the Respondents filed motions for sanctions under sections 128.5 and 128.6. As stated above, CCP § 128.5 is barred from usage in this case. As to CCP § 128.6, that section was never before mentioned either in the trial court or Appellate Court proceedings. The use of CCP § 128.6 exemplifies the carelessness in the writing of this unpublished opinion. (App A-13)

Petitioners filed a motion for sanctions with the Appellate Court, which enumerated multiple felonious acts allegedly perpetrated by the Mr. Kellison, Mr. Davis, and their clients. **The evidence was irrefutable**, and included

Penal Code § 134, Preparing False Evidence, Penal Code § 132, Offering False Evidence, Penal Code § § 118a, 119, 126, 129, Perjury, Penal Code § 124, Uttering, along with violations of the Business and Professions Code § 6068(d), § 6068(g), § 6106, which deal with acts of moral turpitude, dishonesty or corruption, and Fraud on the Court. (App I)

The acts perpetrated by Respondent's attorneys, Mr. Kellison and Mr. Davis, are so egregious that Justice Nicholson, at oral argument, accused Mr. Kellison of "jury-rigging" the Record. Yet there has been no reprimand of any kind. Isn't "jury-rigging" illegal?

As to Petitioner's motion for sanctions, the Appellate Court made short shrift of these egregious acts by stating: "We deny the request." The felonious acts of fabricating and falsifying evidence, perjury, subornation of perjury, and the denial of sanctions, which were requested based on these egregious acts, make a mockery of the judicial system and exemplify a callous indifference to the law not only by attorneys but the Appellate Court as well.

UNPUBLISHED OPINIONS DENY EQUAL JUSTICE UNDER LAW

On a children's broadcast, *Nick News*, Justice Ginsberg stated: "We would have chaos and not the rule of law if each judge in the land did simply what he or she thought was right instead of what the law requires." *Nick News* (Channel 36, San Francisco Area, TV rebroadcast, 12/27/97)

"If the court of appeal decision is unpublished, it has no precedential value by definition, and therefore the supreme court will usually deny the petition for review...**It is nearly review-proof** because it has no precedential value." (2 California Continuing Education of the Bar, California Civil Appellate Practice § 22.6, at 960 (3d ed. 1997)) (Emphasis added)

The hurdle of having an unpublished opinion reviewed

by the U.S. Supreme Court is so high that the lower courts are almost completely assured that any arbitrary decision they make will never be reviewed let alone overturned. The Rule of Law, especially in the present case, has been thrown out the window.

Schmier v. United States Court of Appeals for the Ninth Circuit and Judicial Council of the Ninth Circuit 279 F.3d 817(Cir. 9 2002) raised the question that unpublished opinions deny equal justice. The Ninth Circuit Court of Appeal's opinion in stated:

> "Given the wide range of interest shown in the debate about unpublished opinions...we think it is only a matter of time before the theoretical questions raised by Schmier's complaint are all properly presented and resolved."

Most litigants who have gone through the Judicial system, as have the Petitioners, and who have met with the multiple violations of their Constitutional rights, as illustrated in the present case, are completely drained financially, physically, and emotionally. Many don't make it to the Appellate stage, let alone the state Supreme Court. Most don't have the chutzpa, especially in pro se, to even contemplate petitioning the U.S. Supreme Court, so this Court may not be aware of the devastating effects of these unpublished opinions, which violate U.S. Supreme Court precedent and the U.S. Constitution. It is obvious from the *Schmier* opinion that the time is now for this Court to decide this question and use its power to force the lower courts to abide by the law instead of hiding arbitrary decisions in unpublished opinions.

In the first volume of the United States Reports by Supreme Court Reporter William Cranch he stated:

> "Even in the same court, analogy of judgment cannot be maintained if its adjudications are suffered to be forgotten...In a government which is

> emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed." (Preface, 5 U.S. [1 Cranch] (1801))

In *County of Los Angeles v. Kling*, 474 U.S. 936 (1985), Justice Stevens referred to unpublished opinions as "secret law." He further states: "For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decision-making without the discipline and accountability that the preparation of opinions requires."

Unpublished opinions can conceal an Appellate Court's extreme departure from established law, court rules, and precedents, without the need to be accountable, thus opening "the avenues to corruption" and tyranny. Published opinions help to guarantee Equal Justice Under Law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Madelaine Durand Edwin Durand

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Supreme Court, U.S.
FILED

02 976 DEC 10 2002

OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES

Edwin Durand, and Madelaine Durand, *Petitioner(s),*

v.

Syed M. Arif, Norman F. Rice, d.b.a North American Technical Trading Co., Inc., Gloria M. Rice, Clifford S. Rice, and Matthew C. Huntley, Esq.,

Respondent(s);

Jerry W. Slusser, James W. Scott, d.b.a Valtec Capital Corp., and Earthco Inc.,

Respondent(s).

On Petition For Writ Of Certiorari
To the Court of Appeal of the State of California
In And For The Third Appellate District

"APPENDIX TO PETITION"
FOR WRIT OF CERTIORARI

Edwin Durand, and Madelaine Durand, *Pro Se Petitioner(s)*
P.O. Box 34719 Reno, Nevada 89533
Tel: (775) 345-0141

158 pp

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APPENDIX A

The opinion of the Court of Appeal of the State of California, Third Appellate District

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

SYED M. ARIF et al.
Plaintiffs, Cross-defendants and Respondents

C035449
(Super. Ct. No. 29224)

GLORIA M. RICE et al.,
Cross-defendants and Respondents,
v.

EDWIN DURAND et al.,
Defendants, Cross-complainants and Appellants.

FILED
Jun 24 2002
Court of Appeal
Third District
Deena C. Fawcett

Appellants challenge the trial court's post-trial rulings denying them relief from judgment, declaring them to be vexatious litigants, and imposing sanctions. Except to reverse the determination of appellants as vexatious litigants, we affirm the trial court's post trial rulings.

FACTS

Plaintiffs, cross-defendants, and respondents Syed M. Arif (Arif), individually and doing business as North

American Technical Trading Company (NATTCO), and Norman F. Rice (Rice) (collectively plaintiffs) filed a complaint on February 5, 1997, against defendant, cross-complainant, and appellant Edwin Durand (Durand).

The complaint alleged Rice, prior to January 4, 1996, owned real property in Lassen County known as Mapes Ranch, along with mining claims and rights associated with that land. He also owned certain mining claims on other Lassen County lands owned by the federal government.

On January 4, 1996, NATTCO allegedly purchased Rice's property and mining rights. Under the purchase agreement, Rice agreed to act as an agent of NATTCO to aide the properties' development. He also retained a royalty interest. Plaintiffs thereafter applied for permits from the County of Lassen to begin mining the properties for pozzolan. According to plaintiffs, pozzolan is a "high-silica high-alumina material that has traditionally been used as a cement additive. One of the largest known natural deposits of Pozzolan is located in the Long Valley Area [of Lassen County]."

The complaint accused Durand of disrupting plaintiffs' efforts to attract investors and commence mining. Durand allegedly staked over plaintiffs' mining claims, recorded various documents attempting to assert title in the properties and mining rights adverse to plaintiffs' title, and made slanderous statements regarding plaintiffs during a closed meeting with staff of the Lassen County Planning Commission who were reviewing plaintiffs' mining permit application.

Plaintiffs sought damages and injunctive relief under causes of action alleging intentional interference with economic relations, libel, slander of title, quiet title, and trespass.

Acting in pro per, Durand answered and, on April 17, 1997, filed a "First Amended Counterclaim Complaint for Injunctive Relief and Damages" (First Counterclaim). Durand named plaintiffs and a number of other individuals, companies and agencies as cross-defendants, many of whom purported to own claims which allegedly conflicted with Durand's claims. The cross-defendants and respondents remaining in this appeal are, along with plaintiffs, Gloria M. Rice; Clifford S. Rice, individually and doing business as Norman Rice Enterprises, Inc.; Matthew Huntley; and Jerry W. Slusser, individually and doing business as Valtec Capital Corporation and Earthco. (For ease of reference, we will refer to the plaintiffs and remaining cross-defendants collectively as respondents unless individual identification is required.)

On the same day Durand filed the First Counterclaim, the trial court issued on order to show cause requiring Durand to appear on June 5, 1997, and explain why the First Counterclaim was not filed in a more condensed format.

On May 8, 1997, the trial court vacated the June 5 hearing, returned the First Counterclaim to Durand, and gave him 30 days to file an amended pleading.

On June 5, 1997, Durand filed a "Second Amended Counterclaim Complaint for Injunctive Relief and Damages" (Second Counterclaim). He alleged he was the owner of mining claims known as the Sierra Lady claims that preceded and competed with respondents' claims. He sought to quiet title in the disputed properties and mining claims in his favor.

Four days later, on June 9, Durand filed a "Supplemental pleading to Second Amended Counterclaim Complaint for Relief and Damages" (Supplemental Pleading). In this pleading, Durand alleged he was

introduced to Rice in 1991 as someone who could help him obtain financing to develop his mining rights. Rice allegedly misrepresented his intent to assist Durand, and instead used confidential information obtained from Durand to develop the mining business for himself and the other respondents. Rice's actions included obtaining allegedly invalid title and mining claims and transferring them to NATTCO. Durand sought damages and injunctive relief under the same causes of action alleged by respondents: intentional interference with economic relations, libel, slander of title, quiet title, and trespass.

The trial court held a case management conference on September 29, 1997. It described the case as one for a "[d]etermination of ownership of claim[s,] damages, breach." The court instructed Durand "to reduce pleadings and to telephone parties on pleadings submitted to them that they do not understand." Durand filed no additional or reduced pleadings.

The court held another case management conference on March 25, 1998. Among other matters, the court allowed Durand's wife, Madelaine Durand, to intervene. (We refer to them collectively as the Durands unless noted otherwise.) According to its minute order, the trial court also ordered the following: "Bifurcate Quiet Title to be set for trial in 45 days agreed to and stipulated by all parties." The court directed Mark Davis, counsel for respondents Jerry W. Slusser, Earthco, and Valtec Capital Corporation, to prepare the order.

On June 22, 1998, the trial court executed an order prepared by Mr. Davis memorializing the orders made at the March 25 management conference. This written order says nothing about the case being bifurcated for trial. Instead, it reads: "The Court dismissed, with prejudice, all causes of action set forth in the 1st and 2nd Amended Complaint, excepting the causes of action for Quiet Title

solely regarding the parties[']' respective claims of title." The document on record is certified as being a copy of an original on file with the court, but the order does not appear on the trial court's docket sheet. The record contains no proof the order was ever served on the Durands. In their reply brief, the Durands claim they saw the order for the first time when reviewing the trial court's files in 2000 after they filed their notice of appeal with this court.

In a letter to the Durands dated July 16, 1998, counsel for respondents referred to the case going to trial as the "title phase of the lawsuit," "title issue," and "title portion of this litigation."

The quiet title issue proceeded to a court trial in October 1998. On April 28, 1999, the trial court entered its Statement of Decision, quieting title in all of the competing claims in favor of respondents, and permanently enjoining the Durands from entering upon respondents' real property and mining claims. The court also determined the Durands' Sierra Lady claims were invalid except for two.

On May 11, 1999, the Durands filed motions to set aside the judgment, to declare a mistrial, and to order a new trial. Much of the motion contained the same arguments the Durands raised at trial. However, the Durands also requested the court to hear their other causes of action which were bifurcated from the first trial, claiming the judgment had not resolved them. On August 20, 1999, the trial court denied the motions.

The Durands did not file a notice of appeal from the trial court's denial of their motion for new trial within the time allowed under rule 3 of the California Rules of Court. Instead, on October *25,* 1999, the Durands filed a motion Entitled "Notice of Motion C.C.P. 473 Relief from Judgment Taken by Mistake & To Set Aside etc. [&] Notice of Motion

C.C.P. 592 Issues of Fact: Jury Trial." Issues of Fact: 1

1 All subsequent references to sections are to the Code of Civil Procedure unless noted otherwise

Nowhere in these papers did the Durands allege what mistake, inadvertence, surprise or excusable neglect *they* committed which resulted in the judgment entered against them. Instead, the Durands attempted to bring all of their pleadings and evidence before the court again in order to receive a determination of their bifurcated causes of action. The Durands asked the court to set aside its judgment as being only an interim order until all remaining causes of action were heard.

Respondents' opposed, arguing each of the Durands' theories for damages was predicated on the Durands' Sierra Lady claims being legally valid. Because the trial court concluded the Durands' claims were not valid, their remaining causes of action were moot. They also argued the Durands failed to show any mistake, inadvertence, surprise, or excusable neglect. (Respondents did not as part of their opposition cite to the June 22 written order allegedly dismissing all of the Durands' other causes of action.)

On November 19, 1999, while the Durands' motions were pending, respondents filed a motion for sanctions against the Durands and a motion to designate the Durands as vexatious litigants. The Durands responded by filing their own motion for sanctions against respondents.

By written order filed February 23, 2000. the trial court denied all of the Durands' motions, but granted respondents motions for sanctions and declaring the Durands to be vexatious litigants. Regarding the Durands' motions, the trial court reasoned as follows: "The Motion for Relief from

Judgment under section 473 is denied on its merits, because it is not timely, because that section is not a substitute for appeal, and because it is yet another attempt to have the Court reconsider its original Judgment. The Motion under CCP 592 is denied because, the Durands having lost on the issue of ownership of the disputed claims, there is nothing left to litigate. The Court's Judgment ... dated April 23, 1999, was intended to and did become a final determination of the rights of the parties, subject only to appellate review. ... There is nothing left to litigate except the mutual motions for sanctions."

The trial court subsequently filed its Prefiling Order designating the Durands as vexatious litigants.

The Durands filed a Notice of Appeal on April 13, 2000, appealing from the trial court's February 23, 2000 order on the parties' post-trial motions and appealing the trial court's April 23, 1999 judgment. On respondents' motion, we dismissed the appeal as untimely filed in so far as it concerned the trial court's judgment on the merits.

In what remains of this appeal, the Durands assert the trial court:

1. Abused its discretion in denying Durands' post-trial motion under section 473;

2. Improperly denied the Durands their right to a jury trial on issues of fraud and economic interference they claim remained pending after the trial court quieted title in favor of respondents;

3. Erred in designating the Durands as vexatious litigants; and

4. Abused its discretion in awarding sanctions against the Durands.

DISCUSSION
I

Trial Court Did Not Abuse Its Discretion in Denying the Durands' Motion for Relief Under Section 473

The Durands argue the trial court abused its discretion in denying them relief under section 473. They assert the tort causes of action bifurcated from the first trial were independent of the quiet title cause of action. They also believed they could not obtain an appealable final judgment until the trial court held a trial on all of their causes of action. Therefore, they filed their motion under section 473 to obtain a trial of their tort theories and to obtain an appealable final judgment. They argue the trial court abused its discretion in denying them the requested relief. We disagree.

Disposition of a motion for relief under section 473 rests largely in the discretion of the trial court, and its decision will not be disturbed on appeal unless there has been a clear abuse of discretion. *(Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196, fn. 6.) Abuse of discretion is established if, considering all of the circumstances before it, the trial court's decision exceeded the bounds of reason. *(People v. Parmar* (2001) 86 Cal.App.4th 781, 792.) 2

---

2 Section 473, subdivision (b) includes provisions for both discretionary and mandatory relief. Mandatory relief is available only from entry of default or judgment of default *(English* v. *IKON Business Solutions, Inc.* (2001) 94 Cal.App. 4th

Respondents first argue the Durands' tort causes of action were all dismissed pursuant to the trial court's order entered June 22, 1998. Given the court records surrounding the validity of this order are unclear – no proof of service on

the Durands, no record of the order in the trial court's docket, the order's contradiction with the trial court's minute order -- we determine to resolve the Durands' argument on another basis.

A party seeking relief under section 473 bears "the double burden of showing (1) diligence in making the motion after discovering *its own mistake*, and (2) a satisfactory excuse for the occurrence of that mistake." *(Eigner v. Worthington, supra,* 57 Cal.App.4th at p. 196, italics added.) If the party "fails to show that a judgment has been taken against him through *his* mistake, inadvertence, surprise or excusable neglect the court may not grant relief. It has no discretion." *(Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1042, internal quotation marks omitted, italics added.)

The Durands' papers on the motion below and their briefs on this appeal argue the trial court's judgment was mistaken. However, the Durands do not argue in their papers the judgment was mistaken because of *their* mistake. Nowhere do the Durands allege the trial court's judgment resulted from their mistake, inadvertence, surprise or excusable neglect. 3

---

3 Because the Durands filed an answer to plaintiffs' complaint, we presume they sought discretionary relief, as they are not entitled to mandatory relief.

At oral argument, Mrs. Durand claimed their mistake was to rely on rule 232.5 of the California Rules of Court as grounds for ensuring they would be able to proceed to trial on their remaining causes of action after trial on the quiet title cause of action. Rule 232.5 states in pertinent part:
"When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried but no proposed judgment shall be prepared until the other issues are tried,

except when ... *a separate judgment may otherwise be properly entered at that time.*" (Italics added.)

Here, the trial court determined the Durands' remaining causes of action became moot upon its resolution of the quiet title action. As a result, the trial court concluded it had nothing left to adjudicate, and it properly entered judgment at that time as allowed by rule 232.5. "[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." *(Wilson v. L.A. County Civil Service Coni.* (1952) 112 Cal.App.2d 450, 453.)

The Durands mistakenly believed rule 232.5 required the trial court to proceed to trial on their remaining causes of action because in their opinion those causes of action were not moot. However, nothing in rule 232.5 prohibited the trial court from determining the remaining causes of action had become moot, or required the court to adjudicate causes of action it determined had become moot.

More significantly for this matter, the trial court's judgment did not result from the Durands' misinterpretation of rule 232.5. The Durands' view of rule 232.5 had absolutely no bearing on the trial court's decision to enter judgment against them. Indeed, when pressed further at oral argument, Mrs. Durand acknowledged her contention of mistake was the *trial court* misinterpreted rule 232.5, i.e., the mistake was made by the trial court, not her. The Durands' failure to prove the judgment resulted from their mistake denied the trial court of any discretion except to deny their section 473 motion, which the trial court correctly did.

II

Trial Court Did Not Unlawfully Deny the Durands

Their Right to a Jury Trial

The Durands allege the trial court's denial of their section 473 motion not only was an abuse of discretion, but was also a denial of their right to a jury trial under section 592 on their tort causes of action. The Durands could not use section 473 to attack a trial court's denial of a jury trial unless such an order resulted from their mistake. Again, the Durands fail to allege any mistake on their part which resulted in them losing whatever right they may have had to a jury trial on their remaining claims.

III

The Trial Court Erroneously Determined

the Durands Were Vexatious Litigants

The Durands claim the trial court erroneously determined they were vexatious litigants as a result of their filing the motion under section 473. We agree.

In their motion against the Durands, respondents alleged the Durands were vexatious litigants under subdivisions (b) (2) and (b) (3) of section 391. These statutes define a vexatious litigant as one who "does any of the following:

"....

"(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the

cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

"(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

Respondents specifically alleged the Durands' motion under section 473 demonstrated the Durands were vexatious litigants.

The Durands failed to appeal in a timely manner either the judgment or the denial of their motion for new trial. Their litigation was thus finally determined against them. However, they subsequently brought their motion for relief under section 473 and raised the same issues which the trial court resolved in denying them a new trial.

The trial court granted respondents' motion under subdivision (b) (2), but did so without stating its reasoning. Subdivision (b) (2) applies when a party repeatedly relitigates or attempts to relitigate the judgment or issues finally determined against him. Here, the Durands filed only one motion after their claims had all been finally determined against them – their section 473 motion. While that motion may have attempted to relitigate the matters raised in the motion for new trial, it was the first time the Durands attempted to relitigate those issues after the trial court's judgment became final. Thus, it was not a "repeated" attempt to "relitigate" issues after a judgment became final. No evidence supports the trial court's determination the Durands were vexatious litigants under subdivision (b) (2)

IV

The Trial Court Did Not Abuse Its Discretion Awarding Sanctions Against the Durands

Respondents filed motions for sanctions under sections 128.5 and 128.6 against the Durands, claiming the section 473 motion was frivolous, was brought for an improper purpose, and lacked legal and evidentiary support. The Durands assert the trial court erred in granting respondents' motions. We disagree.

"We review the imposition of monetary sanctions for a prejudicial abuse of discretion." *('20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1277.)

Prior to receiving the section 473 motion, the trial court had already determined on a motion for new trial the Durands were not entitled to any of the relief they sought. The Durands disagreed with those determinations, but failed to appeal them to this court in a timely manner. Instead, they filed their section 473 motion, raising the same arguments raised in the motion for new trial, and doing so without demonstrating any legal basis for seeking relief under section 473. The trial court did not abuse its discretion in awarding sanctions.

V

Durands' Motion for Sanctions

The Durands ask us to impose sanctions on respondents. We deny the request. (§ 907; *In re Marriage* of *Flaherty* (1982) 31 Cal.3d 637.)

DISPOSITION

The order determining the Durands to be vexatious litigants is reversed. All of the remaining appealed orders are affirmed.

The parties shall bear their own costs on appeal.

NICHOLSON, Acting P.J.

We concur:

HULL, J.

KOLKEY, J.

APPENDIX B

The decision of the Court of Appeal of the State of California, Third Appellate District, denying Appellants' Petition for Rehearing

IN THE

Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

FILED
JUL 22 2002
COURT OF APPEAL -
THIRD DISTRICT
DEENA C. FAWCE1T

SYED M. ARIF et al.,
Plaintiffs, Cross-Defendants and Respondents,
GLORIA M. RICE et al.,
Cross-Defendants and Respondents,
v.

EDWIN DURAND et al.,
Defendants, Cross-Complainants and Appellants.

C035449
Lessen
County
No. 29224

BY THE COURT:

Appellants' petition for rehearing is denied.

Dated: July 22, 2002

NICHOLSON, Acting P.J.

APPENDIX C

The decision of the Supreme Court of the State of California, denying Appellants' Petition for Review En Banc

Court of Appeal, Third Appellate District - No. C03 5449
S108975

IN THE SUPREME COURT OF CALIFORNIA
En Banc

SYED M. ARIF et a!., Plaintiff, Cross-defendants and Respondents,

v.

GLORIA M. RICE et a!., Cross-defendants and Respondents;

EDWIN DURAND et a!., Defendants, Cross-complainant and Appellants.

Petition for review DENIED.

SUPREME COURT
FILED
SEP 1 1 2002
Frederick K. Ohirich Clerk

DEPUTY

GEORGE

Chief Justice

C1

APPENDIX D

The Order After Hearing of November 29, 1999, of the Superior Court of the State of California, In and for the County of Lassen

LASSEN COUNTY COURTS
220 S. Lassen Street
Susanville, Ca 90130

FILED
FEB 23 2000
Lassen County Superior Court
R. REED, CHIEF ADMIN. OFFICER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LASSEN

SYED M. ARIF, etc, et al.,
Plaintiffs,

No. 29224
ORDER AFTER HEARING
OF NOVEMBER 29, 1999

vs.

EDWIN DURAND, et al.
Defendants.

EDWIN DURAND, etc., et ux.,
Cross Complainants,

vs.

SYED M. ARIF, etc., et al.,
Cross Defendants.

The Durands have filed three post judgment motions. They seek relief under CCP §473, CCP §592, and CCP §128.7(c)(1). The Arif plaintiffs and cross defendants have sought sanctions under 128,7, CCP; and have asked that the Durands be designated vexatious litigants under CCP §391. The Cross-Defendants Valtec and Earthco have also asked for sanctions under section 129.7, CCP.

It is ORDERED that the Durands Motions are denied. The Motion for Relief from Judgment under section 473 is denied on

its merits, because it is not timely, because that section is not a substitute for appeal, and because it is yet another attempt to have the Court reconsider its original Judgment. The Motion under CCP 592 is denied because, the Durands having lost on the issue of ownership of the disputed claims, there is nothing left to litigate. The Court's Judgment for Permanent Injunction and Determining Right of Possession dated April 23, 1999, was intended to and did become a final determination of the rights of the parties, subject only to appellate review. That decision was reviewed on the Durands' motion to reconsider and was affirmed by the Order on Various Post Trial Matters dated August 20, 1999. There is nothing left to litigate except the mutual motions for sanctions.

It is further ORDERED that the Motion of the Durands for sanctions is denied. It is ORDERED that the Motions of the Arif plaintiffs and the Valtec cross defendants are granted to the extent of awarding sanctions under §128.5 and 128.7, CCP, in the amount of $1,000.00 for each group; a total of $2,000.00 for all non-Durand parties.

The Arif plaintiffs and cross defendants have moved for an Order determining that as to them the Durands are vexatious litigants and prohibiting the Durands from filing new litigation without first obtaining permission of the presiding judge of whatever California jurisdiction in which they wish to file. That motion is granted. Edwin and Madeline Durand are determined to be vexatious litigants within the provisions of §391(b)(2), CCP. They are prohibited from filing any litigation against Syed M. Arif; North American Technical Trading Co; Nattco; North

American Technical Trading Co. (Inc. Of Illinios); Norman F.Rice; Gloria M. Rice; Clifford S. Rice; Norman Rice Enterprises, Inc.; Arthur Koffinke, Jerry W. Slusser, individuallY and dba Valtec Capital Corporation & Earthco unless they first follow the procedures set out in CCP §391.7.

Dated: February 18, 2000

/S

Larry L. Dier, Judge

APPENDIX E

Appellants' Petition for Rehearing, Court of Appeal of the State of California, Third Appellate District

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

SYED M. ARIF et al.,
Plaintiffs/Cross- Defendants
and RespondentS

CASE NUMBER.
3 Civil C035449

and

Lassen County Sup.
Ct. #29224

JERRY SLUSSER, VALTEC/EARTHCO et al .
Cross-Defendants and Respondent,

v.

EDWIN and MADELAINE DURAND
Defendant/Cross-Complainants
and Appellants.

APPELLANTS' PETITION FOR REHEARING

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

SYED M. ARIF et al.,
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CASE NUMBER.
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Cross-Defendants and Respondent,

v.

APPELLANTS' PETITION FOR REHEARING

EDWIN and MADELAINE DURAND
Defendant/Cross-Complainants
and Appellants

INTRODUCTION

This court based its opinion on its own theory rather than the Respondent's arguments. This court stated that the validity of the Order of June 22, 1999, which was, along with the allegedly falsified Local Rules used by Mr. Kellison, the only defense used by the Respondents, is unclear, and therefore determined to resolve this appeal on another basis.

This court's opinion is predicated on the erroneous assumption that the trial court had jurisdiction to dismiss or consider "moot" a viable cause of action, and that the Durands never asserted their mistake, inadvertence, surprise, or excusable neglect.

This court's opinion states, "Here, the trial court determined the Durands' remaining causes of action became moot upon its resolution of the quiet title action." (Opinion pp. 11) The first statement by the trial court that Durands' other causes of action had disappeared or become "moot" was in the "Order" of February 23, 2001, which is the "Order" being appealed. The Record is very clear that Durands' tort cause of action was *not* "moot," and that the trial court just refused to allow a fair adversarial hearing on the issue.

This court affirms on the ground that there must have been some *unknown* reason, which supported this supposed "finding" by the trial court. As we demonstrate below, there is no evidence, or legal reasoning, which supports the trial court's determination the Durands' "Fraud" cause of action is "moot," and this arbitrary dismissal in the "Order" now being appealed is a violation of Durand's civil rights of due process.

We will also demonstrate below that the Durands' argued mistake, and surprise.

Durand will also demonstrate that the Superior Court of Lassen County has no jurisdiction over Federal Statutes pertaining to Federal lands and so the "Judgment" of April 28, 1999, pertaining to the mining claims is void.

This court affirms the trial court's granting of sanctions in violation of the "safe harbor" provision.

This court denied sanctions against the respondents and their attorneys based on CCP § 907 and *In re Marriage of Flaherty* (1982) 31 Cal.3d

637. Both the statute and cited case law deal with the filing of a frivolous appeal. There is nothing in this statute or case law dealing with the egregious violations of the Penal Code and the Business and Professions Code as shown by uncontrovertable, indisputable evidence, that was allegedly perpetrated by the Mr. Kellison, Mr. Davis, and their clients.

Whether the court grants a rehearing or not, it must report these unlawful acts to the State Bar, the Attorney General's Office, and the Department of Justice for criminal prosecution, and permanent disbarment. Attorneys can no longer be considered "above the law" as they have in the past and present.

FACTS NOT STATED IN OPINION

There are numerous facts that were not enumerated in this courts opinion: especially important were the interference with economic relations, theft of intellectual property and research, unjust enrichment, etc., that were perpetrated by Mr. Jerry Slusser and his associates who comprise Valtec Capital Corporation and Earthco, against Durand and which make up Durand tort cause of action.

A complete factual recital of the egregious acts committed by the Respondents and their attorneys was included in the Appellant's Opening and Reply Briefs and will not be reiterated here.

The statement that Durand attempted to bring all of their pleadings and evidence before the court again in order to receive a determination of their bifurcated causes of action is erroneous. (Opinion

pp. 6) The evidence included in the 473 motion had not been presented to the trial court since it was barred from the initial quiet title trial.

A.A. refers to Appellants Appendix; A.O.B. refers to Appellants Opening Brief; R.T. refers to Reporter's Transcript.

LEGAL DISCUSSION

A. TRIAL COURT LACKED JURISDICTION OVER ISSUE OF VALIDITY OF FEDERAL MINING CLAIMS

Jurisdictional defects are never waived. Thus, jurisdictional defects can be raised at any time, including for the first time in a petition for rehearing (*Sime v. Malouf* (1950) 95 CA2d 82, 116, 213 P2d 788)

Issues concerning trial court subject matter jurisdiction must be addressed no matter how far into the appellate process the matter is first raised. (*Marriage of Oddino* (1997) 16 C4th 67, 73, 65 CR2d 566) Jurisdictional issue was raised for the first time in petition for supreme court review.

The Constitution of the United States, Article III, Section 2 states, in pertinent part:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be shall be made, under their authority."

The U.S. District Courts have jurisdiction over federal lands, federal laws, and federal issues. The question of the validity of mining claims on federal lands in this case is based on the United States Code, the Code of Federal Regulations, and the U.S. Public Law 94-579-Oct. 21, 1976 commonly known as FLPMA, the Federal Land Policy and Management Act and therefore the subject matter jurisdiction is under the Federal Courts.

Judge Noel Watkins on March 25, 1998 stated he doubted the Superior Court in Lassen County had jurisdiction.

> "If, however, it appears from the bill that the complainant asserts a right under and by virtue of some law of the United States, and that such right constitutes, in whole or in part, its alleged cause of action, and demands for its determination the construction or proper application of a law of the United States, it is equally clear that jurisdiction is shown.." (*Nevada Sierra Oil Co. V. Miller* (1899) 97 F. 681)

Any judgment made where the trial court lacked jurisdiction is void. Any subsequent judgment or order predicated upon a void judgment is void.

B. APPELLATE COURT'S OPINION BASED ON AN UNBRIEFED ISSUE

The Appellate Court's affirmation of the trial court's denial of Durands' 473 motion has two prongs:

1. That the Appellate Court had found that Durands' tort causes of action had somehow become "moot," and therefore "nothing in rule 232.5 prohibited the trial court from determining the remaining causes of action had become moot, or required the court to adjudicate causes of action it determined had become moot."

2. That the Durands' never asserted their mistake, inadvertence, surprise, or excusable neglect for a 473 motion to be granted.

The issue of how Durands' tort cause of action somehow became "moot" is an unbriefed issue.

A petition for rehearing *must* be granted if the decision was based on an issue not raised or briefed by any party and the court failed to give the parties an opportunity to present supplementary brief on that issue. (Gov.C. § 68081; *Adoption of Alexander S.* (1988) 44 C3d 857, 864, 245 CR 1, 5; *California Cas. Ins. Co. v. Super. Ct.* (Chellette) (1996) 46 CA4th 1145, 1149-1150, 54 CR2d 118, 119-120)

C. TRIAL COURT'S REFUSAL TO DETERMINE DURANDS' TORT CAUSE OF ACTION IS A VIOLATION OF DURANDS' CIVIL RIGHTS

It will be clearly shown below, in the words written by Mr. Craig Kellison and adopted by the trial court, that the trial court refused to consider or determine Durands' tort cause of action. Such abuse of discretion constitutes a violation of Durands civil rights and must be reversed.

The United States Constitution, 14th Amendment, Section 1, states in pertinent part:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The California Constitution, Article 1, Section 7 states in pertinent part: "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws..."

The California Constitution Article 1, Section 16, states in pertinent part: "Trial by jury is an *inviolate right* and shall be secured to all..." (Emphasis added)

In violating Durands' civil rights, the judge violated his oath of office which states in pertinent part: "I will bear true faith and allegiance to the Constitution of The United States and the Constitution of the State of California..." (Ca. Const. Article 20)

D. DURANDS FORMALLY REQUEST APPELLATE COURT TO GRANT EQUITABLE RELIEF

The record on appeal proclaims the trial court did not determine Durands' tort cause of action, and violated Durands civil rights under the Constitutions of the United States and the State of California.

Based on the trial courts refusal to allow proper adjudication of Durands' tort cause of action and the civil rights violations, Durand formally requests the Court of Appeals to grant equitable relief by reversing the trial court's order and allowing Durand to proceed to trial with their tort cause of action.

E. THE RECORD CLEARLY DEMONSTRATES THE TRIAL COURT'S ABUSE OF DISCRETION

This court's opinion states that disposition of the motion per CCP 473 will not be disturbed unless there is an abuse of discretion (*Eigner V. Worthington* (1997) 57 Cal.App.4th 188, 196, fn. 6) and that abuse of discretion is established if, *considering all* of the circumstances before it, the trial court's decision exceeded the bounds of reason. (*People v. Parmer* (2001) 86 Cal.App.4th 781, 792.) (Emphasis added) (Opnion pp. 9)

However, *People v. Parmer, supra,* 86 Cal.App.4th 781 further states:

> "the scope of discretion always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion."

We will demonstrate below that the trial court transgressed the "confines of the applicable principles of law."

F. TRIAL COURT'S OWN WORDS STATES IT DID NOT CONSIDER ALL CIRCUMSTANCES.

The Statement of Decision was filed April 28, 1999, which stated:

> "This issue is also difficult for the Court to respond to. Apparently, the Durands maintain that the Court should sympathize with the notion that they were somehow taken advantage of by some or all of the Plaintiffs and Cross-Defendants. Here, the Plaintiffs and Cross-Defendants presented a prima facia case establishing their possessory interest to each and all of the Ironcloud, Jennifer, Native American and R&R claims. *Thus, the issue of who-did-what-to-whom would appear to be outside of the scope of the narrow issue of quieting title that was presented to this Court for consideration."* (Emphasis added)(A.A. Vol. 12, 3190-3191)

G. TRIAL COURT NEVER DETERMINED DURANDS' TORT CAUSE OF ACTION

This court's opinion further states: "Here, the trial court *determined* the Durands' remaining causes of action became moot upon its resolution of the quiet title action. As a result, the trial court concluded it had nothing left to adjudicate, and it properly entered judgment at that time as allowed by rule 232.5." (Emphasis added) (Opinion pp. 11)

Rule 232.5 of the California Rules of Court, states:

> "When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried and shall, . . . but no proposed judgment shall be prepared until the other issues are tried, except when an interlocutory judgment or a separate judgment may otherwise be properly entered at that time."

Rule 232.5 does not explain when a separate judgment is available.

The Deluxe Black's Law Dictionary, Sixth Edition states:

> "A 'determination' is a 'final judgment' for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action. *Thomas Van Dyken Joint Venture v. Van Dyken*, 90 Wis. 236, 279 N.W.2d 459, 463."

The "Order" of February 23, 2000, which is now being appealed, is the first time the trial court referred to Durands' tort cause of action as being "moot." However, the trial court's own words in the Statement of Decision are clear and convincing evidence that Durands' tort cause of action was never determined, as required by law.

The question is:
1. How did it become moot?
2. Why did it become moot?
3. Where did it become moot?
4. When did it become moot?

The answer to those questions is "it didn't." The trial court did not, as this court's opinion states, resolve or "determine" the factual dispute of the Durands' tort cause of action; to the contrary, the trial court refused to determine this factual dispute. In fact the trial court's refusal to determine an issue of fact goes against every authority on point and was erroneous as a matter of law.

The Record is clear that Durands' tort cause of action was viable, that the trial court had no legal reason to consider it not viable, and because Durand kept asserting their right to due process, finally stated in the "Order" of February 25, 2000 that it was "moot," but did so without adjudication or determination as required by law.

H. THE APPELLATE COURT CANNOT PRESUME TRIAL COURT'S DECISION WAS CORRECT

"When the record clearly demonstrates what the trial court did, we will not presume it did something different." (*Lafayette Morehouse, Inc. v. Chronicle Pub. Co.* (1995) 39 CA4th 1379, 1384, 46 CR2d 542, 545)

> "Where the trial court has made no findings, the reviewing court will not on such a record make independent findings of its own, and where the facts are in conflict the appellate court will not supply the missing facts." *Packer v. Sillas* (1976) 128 Cal.Rptr. 907, 57 C.A.3d 206.

A record demonstrating that the trial court failed to perform its function of weighing evidence or failed to exercise its discretion in making a discretionary ruling overcomes the presumption of correctness and warrants a reversal on appeal. What the trial court did was refuse to allow Durands' viable tort cause of action to be adjudicated in a fair adversarial hearing, thus violating Durands' civil rights.

This court's opinion presumed the trial court had "determined" Durands' tort cause of action, when in fact the record clearly states otherwise.

CCP 632 states in pertinent part:

> "... The court shall issue a statement of decision explaining the *factual and legal basis* for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial."

The lack of adjudication of the Durand tort cause of action was brought to the trial court's attention in Durand's Request for Statement of Decision, (A.A. Vol. 12, 3116-3117) Proposals to Issues Raised in Defendant/Cross-Complainants Request for Statement of Decision, (A.A. Vol. 12, 3143-3148) and the Objection to (Proposed) Statement of Decision (A.A. Vol. 12, 3167-3169).

The trial court stated: "Thus, the issue of who-did-what-to-whom would appear to be outside the scope of the narrow issue of quieting title that was presented to this Court for consideration." Where is the factual and legal basis for this statement as required by CCP § 632? The above statement does

not state that Durands' tort cause of action was "moot." It states clearly that the trial court did not consider the issue of "who-did-what-to-whom". Mr. Kellison wrote this Statement of Decision and has a personal interest in making sure that the "Fraud" tort cause of action never gets to a jury trial. It is also important to note that there is no mention of the alleged "dismissal order" of June 22, 1998 that the Respondents purported in their briefs as the definitive evidence that Durands' tort cause of action had been dismissed.

Previously, Judge Guy Martin Young had made a Tentative Decision based on all of the evidence including the egregious acts perpetrated by Mr. Rice, Slusser/Valtec/Earthco that are a part of the "Fraud" tort cause of action.

Judge Young stated:

> "THE COURT: For the record, if not in this hearing, but in private hearings, there has been substantial evidence presented that would allow the Court to conclude that the validity of the Durand's case, or claims, is likely to be established." Mr. Davis" As to Earthco? THE COURT: As to the claims, all the claims." (R.T. hearing 11/19/97 pp. 30:21)

Of course, Mr. Kellison and his client Mr. Matthew Huntley, Esq., immediately had Judge Young removed.

Peterson v. Ellebrecht (1962) 205 Cal.App.2d 718 [23 Cal.Rptr. 349, at pp. 351] states:

> "A judgment rendered without findings on all material issues must be reversed. . . . [8] Not only must the court make findings on all material issues, but the findings made must be definite and certain. (*Estate of McAfee* 182 Cal.App.2d 553, 556 [6 Cal.Rptr. 79].) Furthermore, it is now the statutory rule that 'If upon appeal . . . it appears that the court has not made findings as to all facts necessary to support the judgment, or that the findings are ambiguous or conflicting upon a material issue of fact, the court before which such appeal . . . is pending shall not infer that the trial court found in favor of the prevailing party on such issue if it appears that the party attacking the judgment made a written request for a specific finding on such issue . . prior to the entry of judgment. ...'(Code Civ. Proc., § 634.)"

The Statement of Decision states the trial court did not consider Durands' tort cause of action; the "Order" now being appealed states Durands' tort cause of action was considered "moot" with the "Judgment" on the claims. These two statements made by the trial court are in direct conflict with each other, and therefore this court must reverse its decision and remand this case so that Durands' tort cause of action can be properly adjudicated by jury trial.

Kaliterna v. Wright (1949) 94 Cal.App.2d 926, [212 P.2d 32 at pp. 36] states: "We have recently held that, where findings are required and are not waived, a judgment without findings is a nullity."

Black's Law Dictionary defines nullity as:

> "Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect."

I. APPELLATE COURT CANNOT PRESUME TRIAL COURT DECIDED ISSUE

CCP 634 states:

> "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

On May 11, 1999, Durand filed their "Notice of Motion, Intention to Move to Set Aside Judgment Per CCP § 663a, Notice of Motion Court Declare Mistrial & Grant New Trial per CCP § 657(1)(5)(6)(7) & Per, Cal. Court Rules Rule 232.5." (A.A. Vol. 12, 3209) This document states that Durands' tort cause of action had not been adjudicated and that the entry of the "Judgment" of April 28, 1999 was in violation of CRC 232.5 (A.A. Vol. 12, 3211:18-28, 3212:10-27, 3217:17-19, 3218:10-3219:2, 3220:17-3221:13, 3222:1-17, 3223:7-3224:11, 3227:1-4)

On August 20, 1999 the trial court denied Durands' motion for a new trial without any determination of Durands' tort cause of action. There is no mention that it became "moot" nor was there any mention of the so called "dismissal order" on which the Respondents predicated their whole defense.

Durand properly brought the lack of adjudication to the trial court's attention as required by CCP § § 634 and 657. The trial court's refusal to determine Durands' tort cause of action must be reversed.

This court in its opinion cited *Wilson v. L.A. County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453 (Opinion pp. 11) stating:

> "[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court."

This case is irrelevant to the present case being appealed. In *Wilson v. L.A. County Civil Service Com., supra,* 112 Cal.App.2d 450 the controversy was moot since the eligibility list on which the suit was predicated, had expired. No eligibility list = no cause of action.

Southern Pac. Co. v. Eshelman (1914) 227 F. 928, a U.S. District Court decision and *Wilson v. L.A. County Civil Service Com., supra,* 112 Cal.App.2d 450, which cited *Southern Pac. Co. v. Eshelman supra,*

(1914) 227 F. 928, the opinions clearly stated as to why the issue had become moot. In *Wilson*, ibid, the basis of the cause of action, the eligibility list, no longer existed. In *Southern Pac. Co. v. Eshelman, supra,* 227 F. 928, the issue had been settled between the two parties. There is no such explanation in the present opinion other than this court presumed Durands' tort cause of action was somehow determined, which such presumption is not available to this court as stated above.

In this case the record clearly states that Durands' tort cause of action was not "moot." The record is undeniable that Durands' tort cause of action was viable before and after the rendition of the "Judgment" of April 28, 1999, and that the trial court abused its discretion by refusing to allow a jury trial on this issue of fact.

Southern Pac. Co. v. Eshelman, supra, 227 F. 928 states: "...did not have the effect of settling the controversy, and the cause could not, therefore, be justly said to have lost its vitality as presenting no living issue."

This court states: "However, nothing in rule 232.5 prohibited the trial court from determining the remaining causes of action had become moot, or required the court to adjudicate causes of action it determined had become moot." (Opinion pp. 11) As stated above, there was no determination of Durands' tort cause of action based on the applicable principles of law, and this court cannot presume there was when the record undeniably states otherwise, and therefore the trial court was prohibited per CCP § 232.5 to enter any alleged final "Judgment."

In *People v. Parmer, supra,* 86 Cal.App.4th 781, Presiding Justice P. J. Scotland states in pertinent part:

> "A trial court's decision ... may be found to be an abuse of discretion if the record does not establish a sufficient basis for invocation of the court's authority. Accordingly, we will review the record in light of applicable principles of law to determine whether defendants presented a sufficient legal basis to support an exercise of discretion. If the record does not establish a sufficient legal basis to support an exercise of discretion, the disqualification order must be considered an abuse of discretion. If a sufficient showing to support an exercise of discretion has been made, the trial court's order must stand unless it appears to exceed the bounds of reason in light of all of the circumstances presented."

The record is clear that, based on the applicable principles of law, the trial court's refusal to allow Durands' tort cause of action to be adjudicated is an abuse of discretion, and that such prejudicial abuse exceeds the bounds of reason.

J. APPELLATE COURT ERRONEOUSLY STATED DURAND FAILED TO ARGUE MISTAKE

Durand has shown above that the trial court expressly stated that it had *not determined* Durands' tort cause of action. Durand had properly filed a request for a statement of decision, and objection

to the statement of decision, and a motion per CCP § 657, each time bringing up the fact that Durands' tort cause of action was still unadjudicated.

Durand stated in their Opening Brief that they had originally filed their 473 motion based on CCP § 473(d) which states that the trial court has the power to "set aside any void judgment or order."

Durands' Opening Brief states:

> "The truth is that all issues between the parties have not been adjudicated. Durand had hoped that the entering of the "Judgment" was an inadvertent "clerical" error of the Trial Court forgetting that this case had been bifurcated and there was still another issue to be heard." (A.O.B. page 43)

As stated above the trial court had not adjudicated Durands' tort cause of action, so no matter what the "Judgment" of April 28, 1999 was called, it was not a final judgment.

7 Witkin Cal. Procedure (4th Ed. 1997) Judgment § 68, p. 595 states in pertinent part:

> "Judicial error, as distinguished from clerical error, is a relatively simple concept...The test is simply whether the challenged judgment was made or entered inadvertently (clerical error) or advertently (judicial error). (*Bowden v. Green* (1982) 128 C.A.3d 65, 70, 180 C.R. 90, quoting the text.)"

When you take the trial court's statement it had not considered or determined Durands' tort cause of action in conjunction with CCP § 473(d), Witken Cal. Procedure and Rule 232.5, Durand hoped that the entry to the "Judgment" was inadvertent rather that an overt act to deny Durand their civil rights under the California and U.S. Constitutions.

Upon realizing that the trial court was deliberately refusing to have this issue of fact adjudicated, Durand stated at the 473 hearing that they must have made a mistake in following and believing in the trial court's ruling that their tort cause of action would be adjudicated in a separate jury trial. (R.T. 473 hearing of 11/29/99, at p. 13:6-23)

K. DURAND WAS SURPRISED BY TRIAL COURT RULINGS

The Durands made the mistake of following the trial courts rulings and were "surprised" to find that the trial court was refusing to abide by the law. (A.O.B. p. 47-48)

"A "mistake" justifying relief may be either a mistake of fact or a mistake of law. "The term "surprise" as used in Section 473 refers to 'some condition or situation in which a party ... is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." *State Farm Fire & Casualty Company v. Pietak* (2001) 90 Cal.App.4th 600.

1. The trial court did not determine Durands tort cause of action.

2. Rule 232.5 states no final judgment will be entered until all causes adjudicated and is ambiguous as to when a separate judgment is available.
3. CCP § 904.1 defines the one "final judgment" rule
4. After trial court denied motion for new trial and ignored CCP 232.5 Durand was left in a "catch 22."
5. 7 Witkin Cal. Procedure (4th Ed. 1997) Judgment § 69, p. 597 states:

   > "A court of general jurisdiction has the power after final judgment, and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the clerk, counsel or the court itself, so that the records will conform to and speak the truth."

6. Misprisions: neglect or improper performances of official duty.
7. In *English v. IKON Business Solution, Inc.* (2001) 94 Cal.App.4th 130, 114 Cal.Rptr.2d 93, Justice Nicholson quoted Justice Epstein's dissenting opinion in *Yeap v. Leake* (1997) 60 Cal.App.4th 591, as follows: "Without belaboring the obvious, it should suffice to say that, in the context of pleadings and motions, a dismissal is the withdrawal of an application for judicial relief by the party seeking such relief, or the removal of the application by a court."
8. Here we have an illegal, involuntary dismissal since the trial court refuses to determine the issue or allow a jury trial. Durand did everything known to do at the time to get the trial court to follow 232.5 but to their surprise they found the trial court was intent on denying them their civil rights.

9. In *State Farm Fire & Casualty Company v. Pietak. supra* (90 Cal.App.4th 600, Justice Hull stated: "Initially, we find no merit in Pietak's contention he was "surprised" by State Farm's dismissal of the interpleader action." (Cal.Rptr.2d, 256 at pp.263)
10. Pietak's attorney did not file an affidavit of fault.
11. This court found that the trial court erred in denying relief and reversed with directions to grant Pietak's 473 motion.
12. "An honest mistake of law is a valid ground for relief when the legal problem posed 'is complex and debatable.'" *State Farm Fire & Casualty Company v. Pietak. supra* (90 Cal.App.4th 600)
13. In reviewing rule 232.5, which states final judgment is when all issues are adjudicated and the part pertaining to a separate judgment is vague and ambiguous; CCP 904.1 which requires all issues to be adjudicated before final judgment; CCP 632 which requires the trial court to state factual and legal basis for decision; in conjunction with CCP 473(d) and 7 Witkin Cal. Procedure Judgment § 69; <u>the state of the law is complex and debatable.</u>

> "While it is certainly true that Pietak's counsel made a tactical decision to pursue his claim in federal court, this does not belie the fact such tactic was informed by a possible misinterpretation of the law. In other words, Pietak chose to abandon the state court action only because he understood the law to permit him to seek relief in federal court." *State Farm*

Fire & Casualty Company v. Pietak. supra (90 Cal.App.4th 600,)

Durand filed under CCP 473(d) in order to gain relief and realizing at the hearing the trial court was intent on violating Durand civil rights stated "mistake" which left Durand in a "surprised" position.

Pietak, supra (90 Cal.App.4th 600,) stated "Counsel need not be right; it is necessary only that the issue be debatable."

Bottom line—Appellate Court did not believe Pietak's theory of "surprise" and there was no affidavit of fault, but this court reversed anyway.

This court's opinion in the present case is opposite of the published opinion reversing the denial of *Pietak's* 473 motion.

CCP 473 is to be liberally construed to subserve and not to impede or defeat the ends of substantial justice. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227)

"...doubt should be in favor of application..." *Andres v. Armstrong* (1959) 168 Cal.App.2d 344, 347.

L. IT IS OF GREAT PUBLIC IMPORTANCE THAT ATTORNEYS ARE NO LONGER CONSIDERED ABOVE THE LAW

This court denied Durands' motion for sanction per CCP § 907 and *In re Marriage of Flaherty* (1982) 31 Cal.3d 637.

Durand filed for sanctions per CRC 41(A) and 26 (e) based on the alleged multiple Penal Code and Business and Professions Code violations. The motion was supported by clear and convincing evidence.

The alleged Local Rules filed with this court by Craig Kellison in his Respondent's Appendix were intentionally falsified in order to support an otherwise worthless defense. The evidence is clear that the "Pretrial Order" of June 22, 1998, never existed until after February 23, 2000.

These alleged egregious, felonious acts cannot go unpunished.

The general public has no confidence in the judicial system. Based on the white-collar crime now so prevalent in the news, especially perpetrated by the attorneys for companies like Tyco, attorneys can on longer be considered "above the law."

It is of grave public importance that what has happened in this case be made public and that the attorneys be prosecuted and disbarred for their alleged unethical and illegal acts. This must be done in order to regain some confidence in the judicial system, and to provide fair warning to those attorneys who have done or are contemplating similar acts.

Sanctions are warranted since the acts perpetrated by Mr. Kellsion and Mr. Davis, are of the most egregious possible.

M. THIS COURT'S AFFIRMATION OF THE TRIAL COURTS SANCTIONS REVERSES THE "SAFE HARBOR" PROVISION

Mr. Davis requested sanctions against Durand under CCP 125.8, a non-existent statute. Even if he meant 128.5 he would still have been wrong since that statute deals with proceedings initiated after January 1, 1995. This opinion needs to be published because, by affirming the trial court's sanctions, this court has reversed the "safe harbor" provision, which hopefully will allow more judges to discipline attorneys.

Mr. Kellison requested sanctions based on the allegation Durands' 473 motion was meritless. It has been shown that Durand was being a vigorous advocate in trying to defend and preserve their civil rights. If this were done to an attorney there would be outrage that the sanctions were "chilling vigorous advocacy."

Respectfully submitted,

/S_____
Madelaine Durand
In Pro Per

/S_____
Edwin Durand
In Pro Per

APPENDIX F

Appellants' Petition for Review, Supreme Court of the State of California

Case No._____

IN THE
SUPREME COURT OF CALIFORNIA

SYED M. ARIF, et al., Plaintiffs,

vs.

EDWIN DURAND et al., Defendants, Cross-Complainants, and Appellants

vs.

SYED M. ARIF, et al., Cross-Defendants, Respondents,

JERRY SLUSSER, et al., Cross-Defendants, Respondents.

After a Decision By the Court of Appeal,
Third Appellate District
Case No. C035449

PETITION FOR REVIEW

MADELAINE DURAND
EDWIN DURAND
In Propria Per Persona
P.O. Box 34719
Reno, Nevada 89533

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Case No._____

IN THE
SUPREME COURT OF CALIFORNIA

SYED M. ARIF, et al., Plaintiffs

vs.

EDWIN DURAND, et al., Defendants, and Cross-Complainants

vs.

SYED M. ARIF, et al., Cross-Defendants

and

JERRY SLUSSER, et al., Cross-Defendants

PETITION FOR REVIEW

ISSUES PRESENTED

1. Does the Superior Court of Lassen County, California have subject matter jurisdiction over a cause of action based on Federal laws, Federal issues, on Federal lands?

2. When a court lacks subject matter jurisdiction, isn't any judgment from a court lacking such jurisdiction void?

3. Isn't any subsequent judgment also void when it is totally predicated on a judgment made void by lack of subject matter jurisdiction?

4. Is the judgment void when "indispensable parties" have not been joined in the case?

5. Does the Superior Court of Lassen County have the authority to ignore the Constitution of the State of California, and the Constitution of the United States, and deny due process along with the inviolate right to a jury trial?

6. Can the Appellate Court ignore the California Rules of Court, specifically CRC Rule 52?

7. Are attorneys who commit multiple felonious acts during the course of a lawsuit, considered "above the law"?

8. Are sanctions that are granted in violation of the "safe harbor" provision or are used to chill vigorous advocacy valid?

WHY REVIEW SHOULD BE GRANTED

The grounds for review in the Supreme Court are made pursuant to Rule 29(a)(1) since the decision in this case is counter to the California Constitution, California Supreme Court decisions, a large body of case law, the California Rules of Court, and the Constitution of the United States.

This case presents very important questions as to the Constitutional Rights of the citizens of California and the United States - whether a court lacking subject matter jurisdiction has the authority to made a judgment - whether a trial court has the authority to deprive the rights of "indispensable parties" who were not joined in the case – whether a trial court has the right to deny citizens their Constitutional inviolate right to a jury trial on a tort cause of action pursuant to the California Constitution Art. 1 § 16 – whether a trial court can deny a

citizen their right to due process pursuant to the California Constitution Art. 1 § 7 – whether the Court of Appeals can affirm on the presumption that the trial court had determined a cause of action, when the Record clearly states the trial court had *not* considered or determined that cause of action, which is a violation of CRC Rule 52 – whether, in the heat of the battle against white collar crime, attorneys, who have allegedly committed multiple felonies, causing obstruction of justice during the course of this litigation, are "above the law" — whether sanctions can be granted in violation of the "safe harbor" provision or granted in a manner which would chill vigorous advocacy?

The answer to these questions must be a resounding "NO!" However, the trial court and the Appellate Court have answered, "Yes," in violation of both statutory and well-settled case law. Even though the Appellate Court's opinion in this case is unpublished, it will erode the Constitution, case law, the statutes, and society at large. If the decision in this case is allowed to stand, California will now have a precedent case wherein parties who steal and defraud, falsify documents and evidence, and obstruct justice, such as those at Enron, Tyco, and Worldcom, will be considered the rightful owners of the stolen property and be absolved of any wrongdoing.

1. JURISDICTION

2.

This question of jurisdiction is two-fold. 1. Does the Superior Court of Lassen County have jurisdiction of a cause of action, which is predicated upon Federal laws, Federal issues, and Federal lands? 2. Can the trial court proceed to judgment without the presence of "indispensable parties"?

Jurisdictional defects are never waived.

For a court to pronounce upon the merits of a case when it has no jurisdiction to do so is for a court to

act ultra vires. Subject matter jurisdiction is a question that often arises and this Supreme Court has stated that it is bound to address the issue.

R.T. refers to the Reporter's Transcripts on Appeal. AA refers to the Appellants Appendix. CRC refers to the California Rules of Court. AOB refers to Appellants Opening Brief.

First, the U.S. District Courts have jurisdiction over federal lands, federal law, and federal issues. The validity of the original mining claims known as the "Ironcloud", "R&R", "Jennifer," and "Native American" was based on the United States Code, the Code of Federal Regulations, and the U.S. Public Law 94-579-Oct. 21, 1976, commonly know as FLPMA, the Federal Land Policy and Management Act and therefore the subject matter jurisdiction is under the Federal Courts.

Second, the "Judgment" of April 28, 1999 giving title to the Cross-Defendants is void since certain "indispensable parties" i.e. Robert Novak, his alleged co-locators and heirs, and American Pozzolan Corporation, were not represented in this case.

Plaintiffs/Cross-Defendants Arif/Rice (hereinafter named Arif/Rice) admitted they never received a deed, which is the only way to legally transfer title, and their only claim to the title of the mining claims was a *forged* "To Whom It May Concern" letter filed with the BLM. Even though Arif/Rice admitted that the letter was a forgery, the trial court granted Arif/Rice clear and quiet title to the mining claims thus denying the Novaks any alleged right, title, and pecuniary interest in the property.

American Pozzolan Corporation had been dismissed from this case in September of 1997 and was

not represented throughout the subsequent proceedings. However, American Pozzolan Corporation was named in the "Judgment" of April 28, 1999, which made the corporation subject to the "Judgment" in its entirety including being liable for the Plaintiffs/Cross-Defendants litigation costs. (AA Vol. 12, 3193-3204)

Many cases state that a court would have no jurisdiction to proceed without these "indispensable parties" and the any subsequent judgment would be void and subject to collateral attack.

This matter is of *grave importance to the general public.* In the present case, parties who were *not* represented have been deprived of their rights and their property without due process of law and been denied equal protection under the law. If the "Judgment" in the present case stands, California will have a precedent wherein anyone can be named in a judgment even though they are not a party to the case. The ramifications of such a case would be the monumental destruction of Article 1 § 7 of the California Constitution.

2. INVIOLATE RIGHT TO A JURY TRIAL

Does a trial court have the authority to deny a party their inviolate right to a jury trial? There are certain cases where the answer could be yes, such as an accident case or malpractice; if the defendant were not found liable there would be no point to have a jury trial on damages. There are possibly other cases where one cause of action is totally predicated on another cause of action, which is determined against the party. However, none of the parameters, which would allow such a dismissal without a fair adversarial hearing, apply to the present case. What we have in the present case is an arbitrary denial by the trial court of an inviolate right to a jury trial on a viable tort cause of action. The trial court's prejudice against the

Durands, as evidenced in the Record, is as bright as the neon lights in Las Vegas, Nevada.

Can a trial court deny Constitutional rights, arbitrarily, prejudicially, without any basis in law? They can if the present case is not reversed.

3. CAN THE APPELLATE COURT IGNORE THE CALIFORNIA RULES OF COURT

The Appellate Court had to resolve Durands' argument on a different basis than the Arif/Rice or Slusser/Valtec/Earthco (hereinafter Slusser) arguments, since the Appellate Court found that their briefs were completely without merit. In fact, the Respondents' arguments were solely predicated upon alleged falsified evidence, which they filed in their Respondent's Appendix.

The problem is that the Appellate Court's theory of the case is directly contrary to the Record. The Appellate Court stated the trial court had determined Durands' tort causes of action to be moot upon its resolution of the quiet title. (Opn. p. 11) However, the Statement of Decision specifically states the trial court had *never considered*, let alone determined, Durands' tort causes of action. (AA Vol. 12, 3190:27-3191:5)

The Appellate Court decision was rendered in violation of the California Rules of Court Rule 52, which states an Appellate Court *cannot* presume something happened when the Record clearly shows otherwise. The case law pertaining to CRC Rule 52 is extensive. But the decision in the present case is contrary to a long list of decisions and therefore significantly impacts and affects the administration of justice and causes great conflict among the courts of appeal.

4. THE APPELLATE COURT'S DECISION IS CONTRARY TO A SUPREME COURT DECISION

It is well settled that motions per CCP 473 are to be liberally construed and that if there is any doubt the 473 should be granted in order to promote the ends of substantial justice. It is also well settled that if the opposing party does not argue prejudice, that very slight evidence is required to justify relief.

CCP § 473(C) states the court may grant other relief as is appropriate. CCP § 473 (C)(d) states that the trial court can correct its own mistakes, such as prematurely entering an "interlocutory judgment" as was done in the present case. The Appellate Court ignored this part of Durands' appeal that was based on this section.

The Appellate Court used a case against Durand, *Parage v. Couedel*, (1997) 60 Cal.App.4th 1037, 70 Cal.Rptr.2d 671, one of only two cases that stated the trial court has no discretion but to deny a 473 motion, unless the applicant proves, beyond a shadow of a doubt, that they were totally at fault for the denial of a fair adversarial hearing. This decision is contrary to a very recent decision made by this same Appellate Court, *State Farm Fire & Casualty Company v. Pietak* (2001) 90 Cal.App.4th 600, 109 Cal.Rptr.2d 256, which stated there was no evidence of the appellant's mistake, inadvertence, surprise, or excusable neglect, but the Appellate Court still granted relief. Again, the lack of uniformity in the law is confusing. Does the court have discretion or not? Is the criterion "any doubt" as the Supreme Court and past case law have prescribed, or is it beyond a shadow of a doubt as in the present case? The Appellate Court decision in this case and the two other decisions, both from the Second Appellate District, are diametrically opposite to the Supreme Court decisions and volumes of case law.

5. ATTORNEY MISCONDUCT

CEO's, their accountants and attorneys have been in the news in recent months with reports of the white-collar crimes they have committed. One particular case comes to mind. The attorney for one of the companies in the news, TYCO, included as part of his retainer, a Ten Million Dollar bonus should he be arrested and convicted of the illegal acts he committed on behalf of his client.

Ohio Congressman James Traficant has also been in the news. Mr. Traficant's guilt or innocence is of no bearing to the case at hand except that during his hearing before the Congressional Committee, he made one statement that is well known and truthful; the citizens of the United States have no confidence in the Judiciary.

Why?

One of the main reasons is that attorneys are considered "above the law." Numerous attorneys have stated to Durand that Rule 11 and the Business and Professions Code are considered, among attorneys, laughable.

In the present case, Durand filed a motion for sanctions against Arif/Rice, Slusser, and their attorneys based on the alleged falsified evidence that they filed with the Appellate Court. (See Appellants Reply Brief) Durand had uncontrovertable evidence these certain documents were falsified. The Arif/Rice and Slusser briefs were totally predicated on the alleged falsified evidence. Durand requested sanctions and a recommendation to the State Bar and the Supreme Court for disbarment and prosecution of both attorneys. The only response was "we deny the request."

It was also clearly shown to the Appellate Court that the sanctions that were granted to Slusser were in violation of the "safe harbor provision."

Sanctions are a punishment but are not to be used to chill vigorous advocacy. Durands' 473 motion may not have been perfect, but after a quick perusal of case law pertaining to 473 motions and listening to statements made by the Appellate Court in oral argument, especially the remark of how Mr. Craig Kellison and Mr. Mark Davis were trying to "jury-rig" the Record in this case, it is easy to see that many attorneys after years of law school and practice are unable to do much better.

Why do the citizens of this country distrust the Judiciary? A good example is that attorneys who commit multiply felonies are not even reprimanded, but a private party is sanctioned for being a vigorous advocate in fighting for their Constitutional rights.

By ignoring the alleged felonious acts perpetrated by the attorneys in the present case the Supreme Court will essentially destroy the Business and Professions Code, Rule 11, and every other rule of ethics, professionalism and morals and open the floodgates for every disreputable attorney to file falsified evidence not only with the trial courts but with the Appellate and Supreme Courts as well, since they know it will go unpunished.

BACKGROUND

Plaintiffs Syed Arif, doing business as North American Technical Trading Company (NATTCO), and Norman Rice filed a SLAPP suit (CCP § 425.16) against Defendant/Cross-Complainant/Petitioner Edwin Durand. (AA Vol. 1, 19-43) Edwin Durand filed a cross-complaint and enjoined Jerry W. Slusser, individually and doing business as Valtec Capital Corporation, and

Earthco, along with Gloria Rice, Clifford Rice, Norman Rice Enterprises, Inc., and Matthew Huntley, Esq. (AA Vol. 2, 178 through Vol. 5, 1185) Madelaine Durand later joined Edwin Durand as a cross-complainant. (hereinafter Durand) The original cross-complaint was returned to Durand and Judge Guy Martin Young ordered a more condensed cross-complaint, which Durand filed the Second Amended Cross-Complaint on June 5, 1997 and the Supplemental to the Second Amended Cross-Complaint on June 9, 1997. (AA Vol. 5, 1189 through Vol. 6, 1333)

The Plaintiffs alleged intentional interference with economic relations, libel, slander of title, quiet title, and trespass. Plaintiffs later abandoned all of their causes of action since their contentions were fraudulent, without supporting evidence, and they had the trial court proceed on the quiet title portion of Durands' Cross-Complaint in order to change the burden of proof.

Durands' Cross-Complaint also alleged Intentional Interference with Economic Relations, Libel, Slander of Title, Quiet Title and Trespass.

In early 1991 Mr. Durand was in negotiations with Mr. Novak for some mining claims, which contained alumina silicate, an industrial mineral commonly know as pozzolan, and Mr. Tim Swickard for some private property.

In September Mr. Durand was introduced to Mr. Rice. Mr. Rice represented himself as a Certified Public Accountant with marketing contacts and funding sources.

Mr. Rice, under the guise of obtaining funding for Mr. Durand, proceeded to defraud Mr. Durand out of his research, intellectual property, and interfered with the economic relations with his business contacts. Mr. Rice

stated under oath it was his intent from the very beginning to defraud Mr. Durand. (October 14, 15, 21, 22, 1998 Trial R.T. Vol. II 486:6 to 493:24)

There was a meeting at First Interstate Bank with Mr. Durand, Mr. Woods, an associate of Mr. Durand, Mr. Swickard, Mr. Rice, and the banker, Mr. Bryan Avaylon. Mr. Swickard was borrowing money using his ranch and cattle as collateral, part of which was to be invested with Mr. Durand for the pozzolan project. The banker Mr. Avaylon turned down the loan, stating he did not know the value of 5,000 head of cattle, and 3,353 acres of prime ranch land.

Mr. Rice, using Mr. Durand's research and intellectual property, got himself funded, and proceeded to negotiate deals with Mr. Novak for the mining claims and Mr. Swickard for the ranch. Mr. Rice and Mr. Avaylon then entered into a partnership along with a few other partners, and under the instructions of Mr. Rice, tried to defraud Mr. Durand out of his latest research. Later, these partners sued Mr. Rice allegedly for Mr. Rice cutting them out of the business while making a backdoor deal with Mr. Syed Arif. Mr. Arif is the Plaintiff in the present case, although he has never been present in court throughout this case.

Upon finding that the Novak mining claims were legally abandoned and not valid under Federal law, Mr. Durand proceeded to properly file valid mining claims.

On February 5, 1997, Mr. Rice and Mr. Arif filed a SLAPP suit (Strategic Lawsuit Against a Private Party) against Mr. Durand for giving testimony at a public meeting of the Lassen County Planning Department. Mr. Durand stated Mr. Rice was an insider trader, which Mr. Rice has admitted to in his sworn testimony, and that North American Technical Trading Company, NATTCO,

was revoked by the State of Illinois and had no status to do business in the State of California, facts that were supported by documented evidence.

Mr. Durand answered the complaint and filed a cross-complaint, enjoining a number of other cross-defendants of which the following remain; Gloria Rice, Clifford Rice, individually and doing business as Norman Rice Enterprises, Inc., Matthew Huntley, Esquire, Mr. Jerry Slusser, individually and doing business as Valtec Capital Corporation and Earthco.

Mr. Rice had no knowledge of the pozzolan mineral deposit, nor had he met anyone involved with the property. Mr. Rice, using Durand's research, got himself funded, and made a deal with Mr. Novak for the claims and with Mr. Swickard for the "Constantia" ranch.

Mr. Novak signed a "Contract of Sale" and an addendum, which stated he would transfer title of the mining claims upon the payment of $1,000,000.00. (One Million Dollars) Mr. Novak, in testimony at the June 20, 1997 hearing in the trial court stated his deal with Mr. Rice had not been consummated and he had never given Mr. Rice any quitclaim deed to any claims. (R.T hearing 6/20/97, 143:10-25, 144:12-15) The legal transfer of title to mining claims is by deed. Mr. Rice admitted in testimony at trial that he had never received any kind of deed transferring title from Novak. (Trial R.T. Vol. II 513:25-514:6)

In a rush to get title before Mr. Novak would sign a deed, Mr. Rice had his attorney Matthew G. Huntley, Esq., file a "To Whom It May Concern" letter with the BLM. Durand had uncontrovertable evidence the letter was forged. In fact, Mr. Craig Kellison admitted to the trial court it was a forgery. (R.T. hearing June 17, 1999, 58:13) The seven Novak signatures (the Novaks were the alleged original locators) had been photo-statically copied

off another letter in the BLM file. (Trial Exhibit # DR & DS, Vol. 14, 3967 letter 7/7/92 versus 3968 letter 9/30/93 with seven forged signatures.)

Durand was told they could not speak for the Novaks. But the Novaks were not a party to this case. The trial court proceeded to give Arif/Rice quiet title to claims allegedly owned by the Novaks without the Novak's consent, knowledge, or participation in the litigation, all based on Mr. Rice's forged letter.

The BLM transferred title in their office because the "letter" was accompanied by the correct amount of money, not because it was a legal transfer of title. Then Mr. Rice proceeded to file a quitclaim deed changing title into his partner's name, Syed Arif, in order to bury the fact he had never received legal title himself.

Mr. Slusser is a longtime associate of Tom Nevis, who was convicted of defrauding the Savings and Loans Companies of approximately One Hundred and Twenty Million Dollars ($120,000,000.00). Mr. Slusser has been convicted of multiple felony frauds. See *Slusser v. Commodity Futures Trading Com'n.* (2000) 210 F.3d 783 (7th Cir. 2000). Mr. Norman Jenson, vice president of Earthco, is a disbarred attorney convicted in the U.S. District Court of Northern California, Case Number CR-87-0546 EFL, of drug trafficking and tax evasion.

Mr. and Mrs. Durand went through 2 ½ years of rigorous work in order to obtain a Surface Mining Use Permit from the State of California, which included a tremendous amount of research in writing their Environmental Impact Studies and Report.

In 1995, Durand was in negotiations with Mr. Francis Brown of Auburn, California, to fund the development of Durands' private property, the building

of a business complex, which included Mr. Durand's skills as a contractor and engineer, along with mining the pozzolan.

Within two days of Mr. Brown checking on the Durands' Surface Mining Use Permit with Mr. Richard Simon of the Lassen County Planning Department, Mr. Slusser contacted Mr. Brown to set up a meeting. Mr. Slusser's purpose was to interfere with the business relationship between Durand and Mr. Brown. He succeeded.

After Mr. Slusser left the meeting, Durand and two witnesses, Mr. Woods and Ms. Pamela Engle, looked through the Slusser/Valtec business plan, which contained Durands' brochure, still with their company name and address on it, and Durands' confidential information, which had been given to the Lassen County Planning Department. There was also a copy of an advertisement/article promoting the Slusser/Valtec product Absorbs-All, which copied Durands' research from their brochure, verbatim.

Judge Bradbury recused himself on this case since he had been the President of the Constantia Ranch and had personal knowledge of the ranch and mining claims. Judge Lazard was assigned but Durand filed a peremptory challenge against him since it was clear he had a very close relationship with Mr. Craig Kellison.

Mr. Kellison set up a hearing for his client Matthew Huntley, Esq., to set aside his default, on January 5, 1998 in Susanville, California. Neither Mr. Kellison nor his client bothered to show. Durand spent a great deal of time in preparation and travel for this hearing but there was no reprimand or sanctions granted against Mr. Kellison.

Mr. Davis and Mr. Kellison set up a deposition with Stacy Beck from the BLM in Sacramento, California. When Durand arrived in Sacramento they found the deposition was canceled without notification to Durand. Again, no sanctions were granted in favor of Durand.

Judge Guy Martin Young was assigned to the case and remained on the case for almost a year, when, after he made the remark that based on evidence and testimony, it looked like the Durands would prevail. Mr. Kellison had Judge Young removed even though Judge Young had made numerous rulings on the case.

Mr. Kellison set up a deposition in Dallas, Texas for Mr. Robert Novak, a key witness and "indispensable party" and then paid Mr. Novak $500.00 to leave Fallon, Nevada, which is 60 miles away from Reno, Nevada where the Durands live, to go to Dallas/Hillsboro, Texas, so that Durand would be unable to cross-examine Mr. Novak at his deposition. Durand filed for a Protective Order with Judge Dier, who had been assigned to the case. Judge Dier refused to rule on the Protective Order, causing gross prejudicial error. (Vol. 8 1925, 1929:20-1930:11, 1951) Mr. Kellison, Mr. Rice, and Mr. Davis spent three days in Texas for a one-hour deposition. The trial court allowed the deposition to be read into the record, even though Durand had not been allowed to cross-examine Mr. Novak. The statements made in the deposition were diametrically opposite to Mr. Novak's spontaneous statements made during testimony and cross-examination at the hearing of June 20, 1997. The act of tampering with and concealing a witness constituted "bad faith" calculated to prejudice Durand's case, harass Durand and cause needless increase to the cost of litigation. After proving to the trial court that Mr. Novak was a Fallon, Nevada resident, the trial court removed the $500.00 "travel expense" but refused to remove the costs of hotel rooms, rental cars, airplane tickets, movie and

alcohol, etc., for Mr. Kellison and Mr. Rice, for their trip to Texas.

Durand had filed three motions to compel, to get Mr. Kellison and Mr. Davis to abide by the rules of discovery. The trial court kept vacating the hearings, and at the beginning of trial, Durand asked the trial court again to rule on the motions. The trial court stated it was not going to rule because it did not know how "they would react." (Trial R.T. Vol. 1 14:3-11)

The trial was split over two weeks, per Mr. Kellison's request, which was totally disruptive and prejudicial to Durand's case since their witnesses had to be taken out of order.

The trial court stated that the trial would proceed on Durands' Cross-Complaint, therefore literally changing the burden of proof from the Plaintiffs to the Defendant, since Arif/Rice had no legal proof of ownership.

Mr. Kellison called the Durands "greasy pigs" although the transcript reads, "greased monkeys." Durand started to object and the trial court stopped Durand. (Trial R.T. Vol. III, 639:15)

The case had been bifurcated by Judge Noel Watkins on March 25, 1998 with the quiet title to be heard first and Durands' tort causes of action to be heard at a separate jury trial. That jury trial never happened in violation of Durands' right to due process and inviolate right to a jury trial on an issue of fact. The trial court arbitrarily and without legal reason, denied Durands' rights.

The trial court's bias and prejudice is blatantly shown in the Record. The trial court refused to allow a fair adversarial hearing on a viable cause of action; the trial court refused to rule on the Protective Order to stop

the witness tampering; the trial court allowed tainted testimony in violation of Durand's right to cross-examine; the trial court refused to remove American Pozzolan Corporation from the "Judgment;" the trial court refused to disallow the expert witness fee for Mr. George Wickman, a Susanville resident in violation of CCP § 1033.5(b)(1); the trial court had made up its mind to deny Durands' 473 and 592 motions *before it had looked at the evidence*; the trial court granted sanctions pursuant to CCP § 128.5, which deals with cases filed before January 1, 1995; the trial court granted sanctions in violation of the "safe harbor provision;" the trial court deemed Durand to be vexatious litigants subject to a prefiling order, without a scintilla of evidence or case law to support such a finding; the trial court stated in its tentative decision: "It is tempting to try to write a decision in this case in such clear language and with such straight forward, tight logic that the parties defendant and cross complainant could understand why their positions are untenable. Sadly, it is doubtful that that could be done. A reading of the post trial briefs shows how frustrating (Kellison and Davis) and futile (Durand Supplement One) such an attempt would be."(AA Vol. 12, 3100:26-3101:4); by not allowing a jury trial on the tort causes of action, the trial court has caused obstruction of justice; the trial court violated Durands' Constitutional rights of due process and the inviolate right to a jury trial.

TRIAL COURT BIAS

As stated above, the trial court's prejudice is blatantly clear. Deciding an issue before looking at the evidence, denying Constitutional rights, refusing to rule on proper motions to compel and protective order, refusing to allow a fair adversarial hearing on a viable issue, etc., all demonstrate actual bias. Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to

speculate whether the bias was actual or merely apparent or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided, but should reverse the judgment and remand the matter to a different judge for a new trial on all issues. The rejection of a proper offer of proof and determination of an issue without a fair hearing constitutes a denial of due process and reversible error per se. Since the trial court's bias was so clear the Appellate Court should have reversed and remanded to a different judge.

LEGAL DISCUSSION
1. JURISDICTION

The Superior Court of Lassen County lacked subject matter jurisdiction as to the validity of the Ironcloud, R&R, Jennifer, and Native American mining claims. Durand has always contended that under Federal law these claims are invalid. Therefore, any alleged judgment made by a court lacking jurisdiction, is void. Any subsequent judgment solely predicated on such a judgment is also void.

Jurisdictional defects are never waived.

In *In re Marriage of Oddino* (1997) 16 Cal.4th 67, 65 Cal.Rptr.2d 566, 939 P.2d 1266, the Supreme Court stated:

> "The question of state court subject matter jurisdiction was not raised by the parties in either of the lower courts and was not addressed by the Court of Appeal; the Plan objected on jurisdictional grounds for the first time in its petition for review. As a matter of fundamental jurisdiction affecting the power of the lower courts to act, however, the issue *must be addressed.*" (Emphasis added)

The U.S. District Courts have jurisdiction over federal lands, federal laws, and federal issues. The question of the validity of mining claims on federal lands in the present case is based on the United States Code, the Code of Federal Regulations, and the U.S. Public Law 94-579-Oct. 21 1976 commonly known as FLPMA, the Federal Land Policy and Management Act and therefore the subject matter jurisdiction is with the Federal Courts.

The Constitution of the United States, Article III, Section 2 states, in pertinent part:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

The United States Code Title 28, Part IV, Chapter 85, Section 1331, states: "Federal question. The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States."

United States Code, Title 28, Part IV, Chapter 89, Section 1441(b) states, in pertinent part:

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

Nevada Sierra Oil Co. v. Miller (1899) 97 F. 681 states:

> "If, however, it appears from the bill that the complainant asserts a right under and by virtue of some law of the United States, and that such right constitutes, in whole or in part, its alleged cause of action, and demands for its determination the

> construction of proper application of a law of the United States, it is equally clear that jurisdiction is shown."

In 1997, Slusser tried to remove this case to Federal Court. Mr. Mark Davis, attorney for Slusser/Valtec/Earthco, filed for removal without notifying Durand or the Superior Court of Lassen County. Durand only found out about it when the U.S. District Court sent Durand a copy of the Order remanding the case back. Durand contacted Mr. Davis for copies of what he had filed with the U.S. District Court but Mr. Davis refused to send copies.

According to the U.S. District Court, Mr. Davis had filed the removal based solely on diversity. (AA Vol. 7 1595:10) The U.S. District Court remanded the case based on the fact that cross-defendants (third-party defendants) are not entitled to remove, that the notice of removal was absent the joinder by all defendants, and that diversity jurisdiction between Valtec/Earthco and Durand did not exist.

However, since the validity of the mining claims is based on Federal laws on Federal lands, and the original jurisdiction is with the U.S. District Court not the state court, pursuant to the United States Code, Title 28, Part IV, Chapter 89, Section 1441(b), diversity is irrelevant.

The other jurisdictional problem is with the trial court's lack of "indispensable" parties.

The Supreme Court, In Bank, stated in pertinent part:

> "...but when a complete controversy cannot be had without the presence of other parties, the court must then order them to be brought in..." (*Bank of California Nat. Ass'n et al. v. Superior Court In and For City*

and County of San Francisco et al., (1940) 16 Cal.2d 516, 106 P.2d 879)

In *Bank of California Nat. Ass'n et al. v. Superior Court In and For City and County of San Francisco et al., supra*, 16 Cal.2d 516, 106 P.2d 879) the Supreme Court further stated:

> "...failure to join the latter was held fatal to the judgment..." "Many cases go so far as to say that the court would have no jurisdiction to proceed without them, and that its purported judgment would be void and subject to collateral attack." ... "It follows that if the court does attempt to proceed, it is acting beyond its jurisdiction and may be restrained by prohibition."

American Pozzolan Corporation was dismissed from the present case in 1997. The "Judgment" of April 28, 1999 was written by Mr. Craig Kellison and adopted by the trial court. Durand objected to the inclusion of American Pozzolan Corporation since the corporation had not been represented throughout the course of this litigation. The trial court made no ruling on the removal of American Pozzolan Corporation from the "Judgment" making the corporation subject to all parts of the judgment including being liable for the litigation costs. (R.T. hearing 6/17/99, 56:17-57:1-9)

The joinder of this non-party into the "Judgment" was before the Appellate Court, but was ignored. (Appellant's Reply Brief, p. 51)

Undoubtedly, this is a case of first impression, but it is a question of law that is of extreme importance to the general public. If the present case stands, it will mean that anyone can name a non-party into a judgment. Such a precedent will cause utter chaos, especially since the

credit bureaus place judgments into personal credit files. It is next to impossible to remove fraudulent or false information out of your credit file, and even if a party is successful, it is usually short-lived, since the credit bureaus sneak the false information back in as soon as a party is not looking. The entry of such false or fraudulent information in a parties credit file could ruin their lives, since they not only could be denied credit, but could be denied employment or could be fired from a present job, since many companies now check credit reports for their employees or future employees.

There were other "indispensable parties" missing from the present case besides American Pozzolan Corporation, namely the Novaks. The "Judgment" in the present case, deprived the Novaks of their right to title and pecuniary interest in their property, i.e. the mining claims.

Arif/Rice presented the trial court with some quit claim deeds for Robert Novak's co-locators, purporting this gave Arif/Rice title. However, the co-locators signed their interest over to Robert Novak, *not* Arif/Rice, and Robert Novak *never* signed the title over to Arif/Rice. In fact, Mr. Rice stated under oath he had never received a deed and had never paid Mr. Novak the full sales price under the contract of sale. Arif/Rice's only claim to title was a forged "To Whom It May Concern" letter filed at the BLM. The law requires transfer of title to be made by deed and State law requires the deed to be recorded within 10 days of the transfer. This *never* happened.

However, the trial court found the forged letter sufficient to quiet title in favor of Arif/Rice thus depriving the Novaks of their property. Robert Novak is now dead, but his co-locators are his heirs and as such they are "indispensable parties."

2. INVIOLATE RIGHT TO A JURY TRIAL

The California Constitution Article 1 § 16 states: "Trial by jury is an inviolate right and shall be secured to all..."

The California Constitution Article 1 § 7 states: "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

In the present case, the trial court denied Durand their inviolate right to a jury trial on a tort cause of action, and their right to due process. Constitutional due process *requires* that parties be given a fair hearing. Errors infringing on this right are presumptively prejudicial and thus *reversible per se*. Denial of a jury trial on jury triable issues is *reversible error per se*. (*Martin v. County of Los Angeles* (1996) 51 CA4th 688, 697-698, 59 CR2d 303, 308-309)

CRC Rule 232.5 states that in a bifurcated case, such as the present case, after one issue is tried, the court will only make a tentative decision until all issues are adjudicated. CRC Rule 232.5 further states: "but no proposed judgment shall be prepared until the other issues are tried, except when an interlocutory judgment or a separate judgment may otherwise be properly entered at that time." This section stating a separate judgment may be entered is vague and ambiguous and West's Annotated California Code's gives no real clarity.

In the present case the trial court prematurely filed a "Judgment" on a bifurcated issue in violation of CRC Rule 232.5, leaving Durand with, according to the law, a nonappealable so-called tentative decision/order/interlocutory judgment, since Durands' tort causes of action remain unadjudicated.

When is a separate judgment available? In a case of liability/damages, it makes sense not to proceed with

the damages when the party is not found liable. But can a trial court file a so-called "final judgment" after it specifically states it has *not considered* or determined a viable cause of action, which still exists between the parties? The trial court thought so and the Appellate Court affirmed. However, this Supreme Court has in numerous cases reached a contrary conclusion, holding that a "final judgment" is one that concludes all causes of action between the parties.

In *Morehart v. County of Santa Barbara* (1994) 7 C.4th 725, 872 P.2d 143, this Supreme Court stated:

> "Accordingly, we hold that an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as "separate and independent" from those remaining."

Any judgment, no matter what it may be titled, is not a "final" judgment, as required by CCP 904.1 and the above Supreme Court ruling, unless there is a disposition of all causes of action.

The substance and effect of the judgment—*not its label*—determine whether it is "final" and thus appealable. (*Griset v. Fair Political Practices Comm'n* (2001) 25 C4th 688, 698, 107 CR2d 149, 156; *Doran v. Magan* (1999) 76 CA4th 1287, 1293, 91 CR2d 60, 64.)

Durands' tort causes of action were not predicated on the quieting of title on some mining claims. This Supreme Court has made it clear that there will be no piecemeal appeals. In trying to give the trial court the benefit of the doubt rather than accusing the court of

extreme prejudice, Durand filed their 473 motion based on the premise that the trial court had made an error in overlooking Durands' tort cause of action rather than stating that the trial court was intent on denying due process. CCP § 473(d) allows the trial court to fix errors or set aside any void judgment or order.

Durand also filed for a jury trial per CCP § 592. However, at the hearing on Durands' 473 and 592 motions, the trial court made it clear that, *before looking at the evidence*, it was not going to allow a fair adversarial hearing on Durands' tort causes of action. (R.T. hearing 11/29/99, 7:9-11, 27:4-10) Durand appealed the subsequent order denying the 473 motion and their motion for a jury trial on the unadjudicated tort causes of action.

A grave error appears on the face of the Appellate Court's opinion. The opinion completely ignores the appeal taken on CCP § 473(d). CCP § 473(d) allows the trial court to fix its errors, such as inadvertently entering a premature "judgment" on one issue in a bifurcated case. CRC Rule 232.5 only allows a tentative decision. The fact is that the appeal on CCP § 473(d) is one of the most essential parts to the appeal and the question remains unanswered. The Rule is that Appellate Courts will not address issues whose resolution is *unnecessary* to the disposition of the appeal. However, in the present case the appeal pursuant to CCP § 473(d) is a vital part of the Durands' appeal and *must* be dealt with. Can the Appellate Court ignore a necessary issue of an appeal? (AOB p. 43)

Does a trial court have the authority to deny the inviolate right to a jury trial on an issue of fact? Does a trial court have the authority to deny due process? It is well settled that any court, which denies the right of trial by jury in a case where any party has the constitutional right to it, exceeds its jurisdiction. It is well settled that the

denial of these rights, as presented in the present case, constitutes an act in excess of jurisdiction and is reversible error per se. (*Witkin 7 Cal. Proc.* (4th), *Trial* §92.) The decision in the present case was an arbitrary refusal by the trial court to abide by the Constitution and the laws of the State of California and is contrary to established case law.

3. APPELLATE COURT VIOLATES CALIFORNIA RULES OF COURT RULE 52

The Respondents' (Arif/Rice, Slusser) Briefs were solely predicated upon alleged falsified evidence they filed with the Appellate Court. The Appellate Court found the Respondents' briefs were completely without merit, and decided to affirm the trial court's ruling on their own theory.

The theory had two parts; the first part was that the trial court had *determined* that Durands' tort causes of action had become "moot" upon the trial court's resolution of the quiet title action. (Opn. p.11) *This presumption is wrong*. The Appellate Court's theory is contrary to what the Record specifically shows the trial court did. In the Statement of Decision the trial court was specifically asked about Durands' unadjudicated tort causes of action, and the trial court specifically stated it had *never considered (or determined)* those causes of action. (AA Vol 12, 3190:27-3191:5) The only mention by the trial court about Durand's tort causes of action being "moot," was in the denial of the motions per CCP § § 473 and 592. The Record is complete and there is *nothing* in the Record that would support the sudden statement by the trial court that Durands' tort causes of action had suddenly become "moot."

The Appellate Court stated: "However, nothing in rule 232.5 prohibited the trial court from determining the remaining causes of action had become moot, or

required the court to adjudicate causes of action it determined had become moot." (Opn. p.11-12) Since the trial court had *not determined* Durands' tort causes of action had become "moot" upon the resolution of the quiet title, CRC Rule 232.5 did, in fact, bar the trial court from entering a "Judgment" on a bifurcated issue.

For the Appellate Court to presume the trial court had determined Durands' tort causes of action when the trial court specifically stated it had not, is a clear violation of the California Rules of Court Rule 52. The trial court's prejudicial error is clearly shown on the face of the record, and as such the Appellate Court acted beyond its jurisdiction in affirming the trial court's decision. The decision in this case goes against every prior decision pertaining to Rule 52, which states that the Appellate Court will *not* presume there was no error when the prejudicial error appears on the face of the record; or that the error was cured by some proceeding not appearing in the record. In this case the Appellants Appendix includes everything subsequent to the Statement of Decision, and the Record clearly shows Durands' tort causes of action were *never considered, or determined,* thus the trial court and the Appellate Court denied Durand due process and their inviolate right to a jury trial on an issue of fact.

Further, the alleged falsified evidence proffered by Arif/Rice (and referred to by Slusser) in their Respondent's Appendix is uncontrovertable evidence that Arif/Rice and Slusser knew that Durands' tort causes of action still existed and had not been adjudicated, and therefore they allegedly falsified the record in order to support the trial court's denial of Durands' constitutional rights.

There is now a huge discrepancy and lack of uniformity of decision between this case and precedent

case law. The precedent case law spells out when and how CRC Rule 52 is to be administered within the correct limitations, and properly guides and restricts the appellate court in resolving the points raised by appellants. Can an Appellate Court ignore CRC Rule 52 whenever it wants to? If this case is not reversed the answer will be "Yes." How many other unpublished opinions are there where CRC Rule 52 was ignored, but the appellants were not able to take it to the Supreme Court?

4. APPELLATE COURT'S DECISION CONTRARY TO RECENT DECISION BY THE SAME COURT

The Appellate Court's opinion further erroneously stated that Durand never alleged the trial court's judgment resulted from their mistake, inadvertence, surprise or excusable neglect, and as such the trial court had "no discretion" but to deny Durands' 473 motion.

First, there is nothing in the wording of CCP § 473(d) that states that the setting aside of a void judgment or order must be based on the appellants mistake, inadvertence, surprise or excusable neglect. On the contrary, it states that the trial court has the authority to correct its own mistake.

> "Section 473 provides in part; 'The court...may, on motion of either party after notice to the other party, set aside any void judgment or order.' Courts also possess inherent power to set aside void judgments. (*Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121, 265 Cal.Rptr. 286.) ...It is well settled that a judgment or order which is void on its face, and which requires only an inspection of the judgment-roll or record to show its invalidity, may be set aside on motion, at any time after its entry, by the

court which rendered the judgment or made the order."(*Reid v. Balter* (1993) 14 Cal.App.4th 1186, 18 Cal.Rptr.2d 287.)

Second, along with CCP § 473(d), (Appellants Opening Brief p. 43) Durand did file their appeal under the mandatory and discretionary parts of CCP § 473.

At the 473 hearing on of November 29, 1999, even though Durand never used the term "surprise" the statements made were synonymous to the legal definition of "surprise." (R.T. hearing of 11/29/99, at p. 10:22-14:4) Durand was *surprised* by the fact that the trial court was intent on denying them their Constitutional right to a jury trial and their right to due process.

"Surprise," as used in the statute permitting relief from judgment, dismissal, order, *or other proceeding*, entered by surprise, refers to some condition or situation in which a party is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against."

In stating that the trial court had "no discretion" in the present case since Durand never admitted mistake, the Appellate Court's opinion in the present case, is in direct conflict with its own recent opinion in *State Farm Fire & Casualty Company v. Pietak, supra,* (2001) 90 Cal.App.4th 600, 109 Cal.Rptr.2d 256, wherein it stated that neither Mr. Pietak nor his attorney ever admitted any mistake, and yet this same Appellate Court ruled that relief by way of section 473 was warranted. According to the theory in the present case, since Pietak had never admitted mistake, the trial court had "no discretion" but to deny Pietak's 473 motion. But the Appellate Court found its way around this through the back door by stating maybe Pietak's attorney did not know what he was doing, maybe Pietak's attorney should have read the

appropriate statutes and case law pertaining to the subject, and maybe the statutes are ambiguous, so maybe this was a honest mistake, and therefore relief is warranted by way of CCP § 473.

The Supreme Court case, *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 695 P.2d 713, 211 Cal.Rptr. 416, states:

> "Section 473 permits the trial court to 'relieve a party...from a judgment, order, or *other proceeding* (Emphasis added) taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect.' A motion seeking such relief lies within the sound discretion of the trial court, and the trial court's decision will not be overturned absent an abuse of discretion...However, the trial court's discretion is not unlimited and must be 'exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'"
>
> "Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted....In such situations 'very slight evidence will be required to justify a court in setting aside the default." (In the present case prejudice was never argued by Arif/Rice/Slusser)
>
> "Moreover, because the law strongly favors trial and disposition of the merits, *any* doubts in applying section 473 *must* be resolved in favor of the party

seeking relief from default." (Emphasis added)

"Where, as here, the trial court denies the motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court's exercise of discretion. (5 Witkin, *op. cit. supra*, § 164, p. 3737.) *Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails.* (Ibid.) Doubts are resolved in favor of the application for relief from default....and reversal of an order denying relief results (5 Witken, *op. cit. supra*, Sec 164, p. 3737). Reversal is particularly appropriate where relieving the default will not seriously prejudice the opposing party." (Emphasis added)

"Reversal of an order denying relief is appropriate where the effect of the order is to 'defeat, rather than to advance the ends of justice....Accordingly, the trial court abused its discretion in denying plaintiffs' section 473 motion."

In the present case the trial court denied Durānds' inviolate right to a jury trial and their right to due process. The Appellate Court affirmed. Not only is this decision contrary to the Constitution, but also more importantly it is contrary to the Supreme Court's decision. There is nothing in *Elston v. City of Turlock, supra,* 38 Cal.3d 227, or in the statute itself that states the trial court has "no discretion" pertaining to either CCP § 473(d) or the section on discretionary relief.

The Appellate Court's opinion in the present case is contrary to the Supreme Court case of *Elston v. City of Turlock, supra,* 38 Cal.3d 227, 695 P.2d 713, and a long line of case law which states that CCP § 473 is to be liberally construed to promote the ends of substantial justice. Not only has there been no justice in the present case, but also the trial court had to violate the Constitution in order to make sure that the ends of substantial justice were defeated.

There now stands two published cases (*Parage v. Couedel, supra,* (1997) 60 Cal.App.4th 1037, 70 Cal.Rptr.2d 671 and *Iott v. Franklin* (1988) 206 Cal.App.3d 521, 253 Cal.Rptr. 635) and one unpublished case (the present case), whose decisions are diametrically opposed to the above precedent Supreme Court decision. These cases have literally stripped the trial court of its discretionary power in dealing with CCP § 473.

5. ATTORNEY MALFEASANCE

The Appellate Court found that the Arif/Rice and Slusser briefs were completely without merit. Mr. Craig Kellison, attorney for Arif/Rice, predicated his entire brief on two documents, both shown to the Appellate Court to be falsified evidence. The first document was the alleged "dismissal order." Mr. Davis, attorney for Slusser/Valtec/Earthco, predicated his entire reply brief on this same "dismissal order."

Durand showed to the Appellate Court irrefutable evidence this "dismissal order" never existed until after the Order of February 23, 2000, denying the CCP § § 473 and 592 motions, was filed. (Appellants Reply Brief)

The second document Mr. Kellison based his Respondent's brief on was a copy of the Lassen County

local rules, which Mr. Kellison had falsified by removing the last page from the old local rules and the first page of the new local rules, combining the two, and then repeatedly stating Durands' appeal must be denied because Durand had not followed a local rule, a rule that was not in existence until two years after the fact. Durand motioned for sanctions, disbarment, and prosecution, but was summarily denied citing CCP § 907 and *In re Marriage of Flaherty* (1982) 31 Cal.3d 637. (Opn. p.15) Both CCP § 907 and *Flaherty, ibid,* pertain to sanctions for filing a frivolous appeal and are irrelevant to Durands' requested sanctions against Mr. Kellison and Mr. Davis and their clients, for attorney malfeasance.

However, in *In re Marriage of Flaherty, supra,* 31 Cal.3d 637, the Supreme Court did state: [Sanctions] "...can serve the important purpose of penalizing the most egregious conduct without deterring valid appellate claims." "...a few extreme examples demonstrate the necessity for a deterrent." Isn't the filing of falsified evidence with the Appellate Court egregious conduct, which would warrant the granting of sanctions? What about the Penal Code violations?

Are attorneys considered "above the law"? If attorneys can so egregiously violate the Penal Code, the Business and Professions Code, Rule 11, and cause obstruction of justice without any repercussions, than the answer is "Yes".

The Appellate Court affirmed the trial courts granting of sanctions against Durand based on their erroneous theory that the trial court had determined Durands' tort causes of action had become moot upon its resolution of the quiet title. The Record belies that theory as stated above.

The sanctions in favor of Slusser were granted in violation of the "safe harbor" provision. The Arif/Rice sanctions were granted on lack of merit.

Sanctions are not to be used to chill vigorous advocacy. When a pro per litigant is sanctioned for being a vigorous advocate in asserting their Constitutional rights, and attorneys who allegedly violate the Penal Code, the Business and Professions Code and obstruct justice, are not even reprimanded, it is no wonder that the American people have zero confidence in the Judicial system. The Supreme Court now has an opportunity, by properly and equally enforcing the law, to stem the tide and regain confidence lost.

CONCLUSION

The Supreme Court has the authority to secure harmony and uniformity in the decisions of all the courts, to enforce their conformity to the settled rules and principles of law, to secure a uniform rule of decision throughout the state, to gain a correct and uniform construction of the constitution, and statutes, and in some instances, to make a final decision by the court of last resort of some doubtful or disputed question of law.

In the present case there are significant issues of widespread importance and it is in the public interest to decide these issues at this time. Review of these issues is necessary to decide important legal questions and to secure uniformity in case law.

VERIFICATION

I/We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that if called to testify as to said matters, I/We could competently do so.
DATED: August 5th, 2002.

/S_____/
MADELAINE DURAND
In Propria Persona

/S_____
EDWIN DURAND
In Propria Persona

APPENDIX G

The Statement of Decision of the Superior Court of the State of California, In and for the County of Lassen

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APR 28 1999
LASSEN COUNTY,
SUPERIOR COURT
R. REED, CHIEF ADMIN.
OFFICER
By: /S_____Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LASSEN

SYED M. ARIF, et al.,
Plaintiffs,

vs.

EDWIN DURAND, et al.
Defendants.

CASE NO. 29224

STATEMENT OF DECISION

[CCP § 632; Rule 232 Cal. Rules of Court]

EDWIN DURAND, et ux.,
Cross-Complainants,

vs.

SYED M. ARIF, et al,
Cross-Defendants.

This case was tried to the court sitting without a jury in November, 1998. At the conclusion of trial the parties were allowed time to brief their positions. The closing brief was filed in January and the matter was submitted then for decision. The Court has read and considered the extensive briefs filed, has reviewed its own trial notes, and has recently reviewed all of the exhibits that were admitted at the trial.

On March 23, 1999, the Durands timely filed a Request for Statement of Decision pursuant to CCP § 632.

The Court is not persuaded that the "claim jumper" arguments add anything to the arguments of the Plaintiffs or Cross-Defendants Earthco and Valtec. The Durands are not claim jumpers if they win this lawsuit; they are if they lose. The Court does not find bad faith on t he part of the Durands. They appear to honestly hold their views that these mining claims are invalid for the reasons they state. If that were true, the properties would have been open to relocation.

Not all of the mining claims that the Plaintiffs and Cross-Defendants hold are subject to competing claims by the Durands. There is no provision in the law for an action analogous to a qui tam action. A non-claiming party has no right to contest the title of a mining claimant. Judgment therefore will be for Arif and Earthco quieting title as against all Defendants and Cross-Complainants to the uncontested (by stipulation at trial) mining claims.

The Defendants and Cross-Complainants challenge the title of the Plaintiff and Cross-Defendants to the contested claims. The suggestion is made that since the Plaintiff and Cross-Defendants cannot trace their claims back to the original locators by means of quitclaim deeds, they do not have title. The Court finds that there is no law or rule that requires transfer by quitclaim. Any method of transfer recognized in California is adequate, even an unrecorded one. It is clear here that the Durands and their corporation are not bona fide purchasers. Therefore, any failure, if there was any, to record the instruments of transfer prior to the Durands' entries onto the mining claims is immaterial.

As to the mining claims to which the Durands hold competing claims, the Court finds Arif and Earthco have met their burden of making a prima facia showing that they or their predecessors made valid discoveries, properly located the various claims, recorded them as required, and have done the annual assessment work or paid since 1993

the necessary fees. The Durands have not overcome this prima facia showing.

Much of the case presented by the Defendants and Cross-Complainants suggests that there may not have been valid discoveries, that the location on the ground may not have met the federal and or state requirements, that the locating could not have been done in the time periods claimed, and that the annual assessment work was either not done or would not qualify. These suggestions were without supporting evidence. In the absence of evidence, the Durands have not overcome the presumption created by the Plaintiffs', the Cross-Defendants', and their predecessors' filings, recordings and payment of fees.

In addition, all of the evidence is that the Durands' claims arose at times when the Plaintiffs and Cross-Defendants or their predecessors in interests were current in their obligations. If there was any default by them, it was cured before the Durands intervened by locating, filing, and recording their claims.

Therefore, it is found that Plaintiffs are entitled to have judgment quieting title in them to the disputed and undisputed claims. It will also be ordered that the Defendants and Cross-Complainants are enjoined from entering onto any of the Plaintiffs' claims or the Mapes Ranch for the purposes of exploration, discovery or location. The Court will also Order title quieted in the Earthco claims.

The Durands also have filed a pleading entitled "Proposals to Issues Raised by Defendant/Cross-Complainants Request for Statement of Decision" which will be construed as proposals to the statement of decision pursuant to Rule 232(b) of the California Rules of Court.

These proposals are actually arguments that were previously raised and rejected by this Court either expressly or implicitly and are summarized as follows:

1. (11) each "Ironcloud" claims traversing U.S. Hwy. 395 BLM letter and federal law uphold validity of "Sierra Lady" Claims.

2. (22) each "R&R" mining claims sold to Tract West, Inc.

3. Prudent Man Test - The BLM Federal mining law shows that without a discovery or proof thereof there is no valid mining claim.

4. Title transferred using forged document; (23) each "Ironcloud"; (22) each "R&R"; (8) each "Native American" mining claims.

5. Location of mining claims, discovery before transfer.

6. Requirements for mining claim and site locations.

7. Types of assessment work that will not qualify.

8. Invalid transfers in chain of title and recorded transfers.

9. Notice of intent to hold - abandonment.

10. Tax default.

11. Tentative decision made by Judge Young based on facts and evidence appeared Durand would prevail on title to mining

claims - Rice insider trader, admitted theft, unjust enrichment, breach of fiduciary and confidentiality relationship, theft of trade secrets, failure to answer motions to compel, obstruction of justice, perjured and false testimony, non-appearance plaintiff and cross-defendant at trial.

The Durands claim that they are entitled to "written findings of fact and conclusions of law" pursuant to CCP § 632. CCP § 632 was amended, however, in 1998 and provides that "written findings of fact and conclusions of law shall not be required".

So far as issues numbered 1 through 11 attempt to challenge the validity of any of the uncontested claims of Plaintiffs and Cross-Defendants, this Court again reemphasizes that the Durands have no standing to challenge these claims. It is well established that title or possession to property may not be attacked by persons showing no color of title in themselves. Perego v. Dodge (1896) 163 U.S. 160; Cole v. Ralph (1919) 252 U.S. 286; Lind v. Baker (1939)31 CA2d 631, 639; Hess v. Moodey (1939) 35 CA2d 401, *404-405;* Judson v. Herrington (1943) 55 CA2d 476, 480; Jackson v. Roby (1883) 109 U.S. 440; Gibson v. River Farms Co. of California (1938) 28 CA2d 757; Pacific States Savings & Loan Co. v. Warden (1941) 18 C2d *757;* Williams v. City of San Pedro (1908) 153 Cal. 44; Hoeller v. Lloyd (1959) 173 CA2d 777.

In Pacific States Savings and Loan Co. v. Warden, supra, at 757, the Supreme Court emphasized:

> ". . .title to property may not be attacked by persons showing no color of title in themselves, and that want of validity may not be set up by strangers and intruders, that is, persons who were neither in possession of the property nor

> connected in any way with the paramount source of title. . . .In a quiet title action the plaintiff must prove his title in order to recover. It has been stated as an elementary rule that "If he has no title, he cannot complaint that some one else, also without title, asserts an interest in the land. . . ." A defendant who does not, himself, claim some right, title, interest, or possession, has no status to question the validity of a conveyance of the property by a third person to the plaintiff.
>
> It may also be said that the plaintiff's *prima facie* showing required the defendant to go forward with proof also as against one shown to be a stranger to the title, the plaintiff's *prima facie* showing would entitle him to judgment."

Similarly, in Gibson v. River Farms Co. of California, supra, the court stated:

> "Here, however, owing to the invalidity of the proceedings, plaintiffs had no title and no possessory rights and a plaintiff in a quiet title action must fail unless he shows title in himself, and is not in a position to complaint if someone else, even without title, asserts an interest in the property. Neither plaintiffs nor the appellant were in a position to complain of the recognition of any right in favor of defendant."

In their opening brief, the Durands cited no law to support their ability to legally challenge the claims of Arif and Earthco to the above-referenced claims. During trial, Durands briefly argued that their interest was similar to the doctrine of private attorney general. There does not exist, however, any statutory authority for a third party to

challenge the use of public lands of another. The Federal Land Policy Management Act of 1976 does allow for the Attorney General of the United States to institute an action to prevent unlawful activity. In 43 U.S.C. § 1733(b), it is provided that:

> "At the request of the Secretary, the Attorney General may institute a civil action in any United States district court for an injunction or other appropriate order to prevent any person from utilizing public lands in violation of regulations issued by the Secretary under this Act."

It is equally clear that the federal statutes and corresponding provisions of the Code of Federal Regulations do not provide for the maintenance of actions by parties having no interest in the challenged claims. 30 U.S.C. Sec. 30 provides, in pertinent part:

> "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature. boundaries, and extent of such adverse claim. . ." [emphasis added]

In the corresponding sections to the Code of Federal Regulation, the issue of who may challenge a decision of the Bureau of Land Management is set forth in 43 C.F.R. § 4.4 10(a), which provides as follows:

> "(a) any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board. . ."

ISSUE NO. 1

(11) each "Ironcloud" claims traversing U.S. Hwy. 395, BLM letter and federal law uphold validity of "Sierra Lady" Claims.

The issue of amended location notices was raised only briefly at trial. There was no evidence presented that would allow the Court to conclude that Durands possess a superior right to any of the claims as a result of defects in any of the amended relocation notices filed by Earthco.

It should be noted, that since none of the contested claims of Arif are located adjacent to Highway 395, any argument that the Durands possessed would appear not to apply to Arif.

With respect to Earthco, the evidence does support that once it was determined that the highway intersected various Ironcloud claims along Highway 395, that Earthco timely filed amended relocation notices to cure the defect. While the Bureau of Land Management determined that the land beneath Highway 395 was "void ab initio" no other ground was affected by the BLM.

It should be noted that the amended relocation notices filed by Earthco do not encompass Sierra Lady Claims No. 164 and 165 as Earthco elected not to include that land in the relocation notices Earthco filed. As such, Arif and Earthco agree that said Sierra Lady Claims and the underlying ground should be quieted in the name of Durands.

ISSUE NO.2

(22) each "R&R" mining claims sold to Tract West, Inc.

As stated above, the Durands have no standing to challenge any of the uncontested R&R mining claims.

The only contested R&R claims relate to R&R claims No. 22 and 23. With respect to these claims, the Court finds that Tract West was not a party to this action and the Durands do not claim title through them. It would only appear to make sense that if the transfer to Tract West in 1980 was genuine, then the issue of ownership and possession as to the R&R claims should be one between Arif and Tract West.

The sales agreement between Novak and Tract West [Exhibit 22] appeared to make the sale of the R&R claims conditional upon payment. This fact became reinforced by evidence introduced by the Durands at trial that Novak claimed ownership of the R&R claims during the lawsuit against Lassenite one year later [see Exhibits 65 and DW].

Thereafter, Novak continued to perform the required annual assessment work and timely made the proper filings in his own name. That was eighteen years ago, and Tract West has never resurfaced to claim a competing interest.

The uninterrupted use for five years also applies in the situation regarding the purported transfer by Novak to Tract West in 1981. Applicable here, however, is that the continued uninterrupted use of the R&R claims for a period of five years by Novak following his purported transfer to Tract West not only eliminated the ability of Tract West to complain - but most certainly eliminated the ability of Durand to claim the defect on behalf of Tract West.

In Altoona Q.M. Co. v. Integral Q.M. Co. (1896) 114 Cal. 100, it was held that "when possession has continued for five years, before adverse rights exist, it is equivalent to location." See, also, Dalton v. Clark, supra, at 140.

The principle is similar to "adverse possession".

With respect to the R&R claims, the continued and

uninterrupted use by Novak for a period of five years at any time prior to the location by the Durands in September of 1993 was equivalent to location.

In Phelps v. Pacific Gas & Electric Co., supra, at 563-64, the Court of Appeals noted:

> "It is also contended by defendant (appellant) that the evidence is insufficient to show that a valid mining claim was established in 1898 by respondents' predecessors in interest. It is argued that the description is insufficient; that there is no competent evidence that the original claim was posted on the ground or that the claim was monumented, and that the amended notice of claim which attempted to more fully describe the claim was ineffectual because it was recorded after the Power Site Withdrawal Order covering the area in dispute. This contention is without substance. The record discloses that in 1898 respondents' predecessors in interest recorded Notice of Location of the claim in question. It is unnecessary to discuss the question of whether or not their acts were sufficient since the trial court found that:
>
> 'Plaintiffs and their predecessors in interest were in the actual, exclusive and adverse possession of said mining claim continuously for more than 40 years prior to the filing of the Complaint herein, and ever since June 20, 1898, or thereabouts, have claimed to own and were the owners of the same and of the right to the sole and exclusive possession thereof against the whole world save with respect to the interest of the United

States of America."

ISSUE NO. 3

Prudent Man Test - The BLM Federal mining law shows that without a discovery or proof thereof there is no valid mining claim.

Again, the Court reiterates its position that the Durands have no standing to challenge the uncontested claims. It must be stressed that the Durands had the "burden of proof' in establishing lack of location or discovery. The Court finds that they failed to meet this burden. Such a finding is especially true when the Durands were required to establish lack of location or discovery as to the contested claims only. The record is devoid of any type of evidence submitted in this regard.

The Durands cite the prudent man test enunciated in Crisman v. Miller *(1905)* 197 U.S. 313, to the effect that:

> "Traditionally, a discovery has been said to exist where the evidence is such that a prudent individual would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine."

For purposes of the present case, however, the argument makes little sense. Here, the Durands have staked claims over the same ground as Earthco and Arif. The Durands do not argue that a "discovery" on their part was necessary with respect to these claims.

The argument then becomes why would a "discovery" by Novak be any less credible than a "discovery" by Durands on the very same property? Should Novak be treated differently as a "person of ordinary

prudence in the further expenditure of his labor and means" as opposed to the Durands?

These types of collateral challenges have never been successful in California courts. Hess v, Moodey (1939) 35 CA2d 401, 404-406; Lind v. Baker (1939) 31 CA2d 631, 639; Judson v, Herrington (1943) 55 CA2d 476, 482; Pease v. Johnson (1951) 106 CA2d 449.

Such defects (discovery, location, etc.) are not subject to challenge when the locator has continued in possession for five uninterrupted years. Hess v. Moodey (1939) 35 CA2d 401, *405-06;* Phelps v. Pacific Gas & Electric Co. (1952); Judson v. Herrington (1943) *55* CA2d 476; Dalton v. Clark (1933) 129 CA 136.

Even if Durand had met his "burden of proof' in establishing lack of "location" or "discovery", Novak's uninterrupted possession for five years eliminated the ability of a junior locator to challenge these types of collateral challenges.

ISSUE NO.4

Title transferred using forged document; (23) each "Ironcloud"; (22) each "R&R"; (8) each "Native American" mining claims.

Durands content that Arif does not hold title to any of the claims as a result of the existence of an alleged "forged document" which was filed with the Bureau of Land Management. The Durands forget, however, that the transfer of claims is subject to state law and recording requirements. This Court finds nothing in the record to support that the "purported forged document" was ever recorded at the county level. Similarly, only R&R Claims Nos. 23 and 24; and Ironcloud Claims Nos. 28, 29 and 31 are contested claims in which the Durands possess any type of

standing.

It is also most difficult to follow the claim by the Durands that one or both of Exhibits DR or DS is a forgery [see Exhibit 731. Assuming this fact could be true, it would only mean that the Novak co-locators did not intend to transfer their interest in the Ironcloud claims to either Arif or his predecessors or Earthco or its predecessors. The Durands logic in offering this evidence is difficult to understand because what business do the Durands have in challenging whether the co-locators of the Ironcloud claims have relinquished their interest in the claims? The Durands do not claim that their interest is derived from these co-locators, and they certainly have no standing to represent said co-locators in the present action or to champion for their cause. At worst, Arif and Earthco would have simply been a co-owner with the co-locators.

Again, the argument becomes meaningless since the exact same co-locators of the ironcloud claims have quitclaimed away their interest to these claims [see Exhibits 66 through 72]. Exhibits 66 through 72 are Quitclaim Deeds from the very same co-locators that founded the Ironcloud claims on November 17 and December 13, 1989 [Exhibit 23]. Further, Novak testified that he witnessed each and every signature on Exhibit DR. Finally, not one of the signatures have ever challenged the transfer effected by these exhibits.

ISSUE NO. 5

Location of mining claims; discovery before transfer.

Again, the Durands claim the absence of discovery with respect to all of the Ironcloud and Jennifer claims. They contend that each of the above referenced claims has been abandoned.

The Durands have no standing to challenge the

uncontested Ironclouds of Jennifers. During trial, the Durands failed to meet their "burden of proof' in establishing lack of location or discovery as to any of the contested Ironclouds and Jennifer claims. These types of challenges have never been successful in California courts. Hess v. Moodey, supra, at 404-406; Lind v. Baker, supra, at 649; and Judson v. Herrington, supra at 482.

ISSUE NO.6

Requirements for mining claims and site locations.

The Durands challenge whether any of the claims were properly located. Since we are dealing with only the contested claims, it is clear that the Durands introduced no evidence at time of trial to support the lack of location. None of the witnesses, including the Durands, had personal knowledge that proper location did not occur. Lack of proper location or impossibility of location requires "clear and convincing evidence". Sampson v. Page (1954) 129 CA2d 356. Clearly, the Durands failed to meet this burden.

ISSUE NO. 7

Types of assessment work that will not qualify.

A contesting claimant is also not permitted to challenge the nature and extent of the work performed. Otherwise, every year thousands of mining claims would be under the scrutiny of would be "claim jumpers". That is precisely the reason that the California Legislature created the "prima facie evidence" standard in Public Resource Code § 39 13(b).

Both Congress and the courts have continually discouraged technical challenges to "assessment work". Pascoe v. Richards (1962) 201 CA2d 680; Ehrhart v. Bowling (1940) 36 CA2d 503; Pease v. Johnson (1951) 106 CA2d 449.

This was best exemplified in Sampson v. Page, supra, wherein the court noted:

> "The law does not require that the labor shall benefit the claim in the sense of making the claim more valuable after the performance of the labor than before. Therefore any labor performed upon the claim, if sufficient in amount, will satisfy the law, if its tendency is to develop the claim as a mine. The digging of prospect holes, or the digging of a cut or cuts or drain ditch or ditches, the removal of brush, panning, etc., and all things done necessary for the doing of assessment work, if sufficient, in amount, will be in compliance with the law. Work done for the purpose of discovery of mineral whatever the particular form of deposit, also is work and improvement within the meaning of the statute. *(Rickelts, supra,* pp. 282-283, fn. 4)
>
> Visibility is an untrustworthy test of eligibility. Worthless trampling on the surface may create a facade of economically valuable activity while $100 worth of underground tunneling may be practically invisible."

During the passage of the 1993 Interior Department Appropriations Act, wherein the "maintenance fee" replaced the previous "assessment work obligation", the legislative history reveals the congressional attempt to eliminate challenges by rival miners concerning the "assessment work" issue. In the legislative history of the 1993 Interior Department Appropriations Act [H.R. Rep. 103-338], it was noted:

> "Diligent development, or that work required to be done annually, that leads toward the development of a mine. This assessment work obligation is policed by rival miners that can legally overstake a non-diligent miner's claim and take possession of the deposit. (This concept has been modified on the federal level with the recent substitution of the $1 00/claim/year "maintenance fee," first in the Fiscal Year 1993 Interior Department Appropriations Act and replicated in the Omnibus Budget Reconciliation Act of 1993."

Thus, one of the goals in instituting the "maintenance fee" was to eliminate the possibility of individuals who sat, waited and preyed on a "technical defect" of the senior locator.

Assessment compliance relies upon the Federal Land Policy and Management Act of 1976 (FLPMA). This Act governed various assessment work requirements until the adoption of the Department of the Interior and Related Agency Relations Act of 1993, which effectively suspended the assessment work requirement for, beginning with the 1992-1993 assessment year. As of 1993 an annual holding fee (identified as a "rental fee" or, later "service charge") for every unpatented lode or Placer claim is required.

All of the alleged defects claimed by Durand pre-date the 1993 "rental *fee*" or "service charge" concept. The adoption of the "rental fee" demonstrated the Department of the Interior's intention to eliminate the ambiguity that was contained in the assessment work recitation that had created so much divisiveness among claimants.

William Tilden referred to the change between the "assessment work" and the "rental fee" as a cleansing, in that the pre-1993 BLM filing was intended to eliminate

collateral attacks as to previous assessment work.

Assuming that any or all of the alleged defects in the assessment work occurred, the defects do not constitute a forfeiture unless there exists a relocation by a third party, and in the absence of such a relocation, the original claimant has the right to resume work and to retain his claim. Madison v. Octave Oil Co. (1908) *154* Cal. 768; Clark v. Mallory (1937)22 CA2d *55;* Altouna Q~M. Co. v. Integral Q.M. Co. (1896) 114 Cal. 100; Kramer v. Gladding. McBean & Co. (1939) 30 CA2d 98.

In the present case, there is no evidence that Durand established his claim over any of the same ground as the claims of Earthco or Arif until September 1, 1993. As a result, any specific claimed defect in the assessment work would have been cured upon resuming work in the year following the alleged defect.

Statutorily, this appears in the mining law of 1872. In 30 U.S.C. § 28, it is provided as follows:

> "On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefore, not less than $100 worth of labor shall be performed or improvements made during each year. . . .and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." [emphasis added]

In Ickes v. Virginia-Colorado Development Corp. *(1935)* 295 U.S. 639, at *645*, the Supreme Court emphasized that "the law is clear that no relocation can be made if work be resumed after default and before such relocation." Similarly, see Hickell v. Oil Shell Corp. (1970) 400 U.S. 48, 53.

In the present case, the Durands cannot challenge any defect in any given year unless it is further proven that the assessment work was not "resumed".

In addition to the Supreme Court decision in Ickes v. Virginia-Colorado Development Corp.. and Hickell v. Oil Shell Corp., supra the Supreme Court of the state of California has also held.

In Pidgeon v. Lamb (1933) 133 CA 342, the court emphasized:

> "In any event, a forfeiture for failure to do the annual labor can only be claimed by one who make a valid location on the claim before the resumption of labor (U.S. Rev. Stats., sec. 2324; *Madison v. Octave Oil Co.*, 154 Cal. 768, 773 [99 Pac. 1761.) It is conceded that defendant performed the required annual labor since 1916, and plaintiffs did not initiate its location until 1930. Hence, plaintiffs could not claim any rights by reason of the alleged forfeiture for failure to do assessment work in 1916 if that fact be conceded."

> Also, the court, in Clark v. Mallory (1937) 22 CA2d 55, at 62, the court stated:

> "... that failure to do assessment work upon a mining claim does not operate to terminate the

> locator's right in favor of a person who has merely taken possession of the claim; the sole effect of the failure, there being no abandonment, was to throw the land open to location to others, and in the absence of such other location, the original claimant's right to resume work and to hold his claim remains."

The Durands question both the nature and extent of the assessment work performed on the claims at issue herein. During trial, they introduced no evidence to support their allegation that the assessment work described in the notice was not performed.

ISSUE NO.8

Invalid transfer in chain of title and recorded transfers.

It is unclear to the Court what is raised by this particular issue since it begins with the contention that it would have been impossible to locate various of the claims in a one day period and then leap to the assertion that only a quitclaim deed should be recognized when effectuating a transfer of claims.

Again, it must be stressed that the Durands do not have the ability to challenge the uncontested claims. As to the contested claims, the burden of proof was on the Durands to establish by "clear and convincing evidence" that acts or omissions of the senior locator have caused the real property to be reopened to location. Sampson v. Page *(1954)* 129 CA2d 356, 362; Dailey v. Wallace (1954) 234 CA2d 689, 692; and Brownv. Murphy (1939)36 CA2d 171, 180.

Durand offered only three witnesses whose testimony touched briefly on the issues relating to (1) discovery; (2) location; (3) assessment-work; (4) impossibility of location, etc. These witnesses were Durand, Sheldon and Witzel.

None of these witnesses made mention of any defect or infirmity as to the 5 contested claims held by Arif. Neither Sheldon, Witzel or Durand testified to or made any mention of defects as to the Ironcloud 28, 29 and 31; or R&R 23 and 24 Claims. Sheldon had no specific recollection of being on said claims. Witzel and Durand had no knowledge of ever being on any of these five claims. Additionally, neither Sheldon or Witzel testified as to defects in the Jennifer claims.

On the converse, Novak testified that he properly located each and every claim and performed the necessary assessment work. Public Resource Code 3913(b) created a prima facie presumption that the work was done. Pepperdine v. Keys 198 CA2d 25.

As to location, Ironcloud 28, 29 and 31 were located on November 17, 1989; and the R&R claims 25 and 26 were located on January 29, 1976. The competing Sierra Lady Claims Nos. 144, 145, 147, 156 and 157 were all located on September 2, 1993 [Exhibit 32].

As to the issue regarding the necessity of a quitclaim deed to transfer an interest in mining claims, there is absolutely no legal authority for such a contention.

When Mr. Durand asked Stacy Beck in her deposition about this matter, the testimony was as follows:

> Question: "If these claims were transferred - you talked about transfer of interest. To transfer interest, what does a transfer interest require besides payment of fee?"
>
> Answer: "A transfer document would need to be filed with us that would show that, lets say, John Doe for whatever sum of money or whatever transfer or gave his interest to another individual."

Question: "Would that have to be a quit claim deed?"

Answer: "Would not absolutely have to be. That is one possible thing it could be."

Question: "Would it have to be a notarized document?"

Answer: "Not here. It does not need to be notarized to be field [filed] here for us to accept us." [Correction made by Judge Dier with his initials]

Ms. Beck is the land law examiner at the Bureau of Land Management in the division of energy and minerals working specifically with the mining claims unit.

43 CFR 3833.3(a)(3) provides that any legal instrument operable under state law is adequate.

"(a) Whenever the owner of an unpatented mining claim, mill site or tunnel site, which has been recorded in accordance with section 3833.1, sells, assigns, or otherwise conveys all or any part of his interest in the claim, his transferee shall file in the proper BLM office.

(3) A copy of the legal instrument or document that operates under State law to transfer the interest in the claim being sold, assigned, or otherwise transferred."

ISSUE NO. 9

Notice of Intention to Hold

Notice of intent to hold - abandonment.

Durand next argues that the evidence fails to support that proper notices of intention to hold were recorded with the County of Lassen; or filed with the Bureau of Land Management. Again, Durands have the ability to challenge only the contested claims.

Apparently, the Durands claim that a "Notice of Intention to Hold" is required to be recorded in the County Recorder's Office and subsequently filed with the Bureau of Land Management.

The Durands, however, cite no authority for this proposition. Public Resource Code § 3914 imposes no such obligation. In fact, specific language exists that the filing of a Notice of Intention is strictly optional.

43 CFR 3833.2-3 provides in pertinent part:

> "(c) Notice of intention to hold a mining claim, mill site, or tunnel site, may be filed at the election of the owner, regardless of whether the assessment work has been suspended, deferred, or not yet accrued. However, the owner shall have filed with the Bureau of Land Management the same documents which have been or will be recorded with the local recordation office. There is no requirement to file a notice of intent to hold for a mill site or a tunnel site with the local recordation office. . . ." [Emphasis Added]

With respect to Arif, the evidence did support that Notices of Intention were recorded and filed in a timely manner for the years 1994 to present.

Further, failure to record documents does not create a forfeiture as the Durand's had actual knowledge of the

claims and cannot take advantage of any claims by failure to record (Crummett v. Miller (1997) 55 Cal.App.4th 897 (62CR2d 113) and MacDonald v. Midland Mining Co. (1956) 139 Cal.App.2d 304, 311, 312 (293 P2d 911)). Additionally, 43 CFR § 3833.1-5(1) states as follows:

> "The payment of the required maintenance fee for a mining claim, mill site, or tunnel site satisfies the requirements to file an affidavit of assessment work or a notice of intention to hold pursuant to § 3833.2."

Accordingly, the Durand's claim of failure to file a notice of intention to hold is without merit.

ISSUE NO. 10

Tax default.

Apparently, the Durands maintain that many of the Earthco claims were abandoned or canceled as a result of tax defaults.

It should be noted, that the Durands provided no evidence whatsoever to support that any claims had been abandoned or cancelled as a result of a tax default. Their argument then must be that they should have been abandoned. The testimony of Lassen County Deputy Tax Collector, Connie Dunks, reflected that all of the unsecured taxes (pertaining to any and all of the claims) subject to adjudication before this Court) were current. If Durands possessed information to the contrary, they failed to cross-examine Ms. Dunks on this issue and further failed to introduce any such evidence at time of trial.

ISSUE NO. 11

Tentative decision made by Judge Young based on facts and evidence appeared Durand would prevail on title to mining claims - Rice insider trader, admitted theft, unjust enrichment, breach of fiduciary and confidentiality relationship, theft of trade secrets, failure to answer motions to compel, obstruction of justice, perjured and false testimony, non-appearance plaintiff and cross-defendants at trial.

This issue is also difficult for the Court to respond to. Apparently, the Durands maintain that the Court should sympathize with the notion that they were somehow taken advantage of by some or all of the Plaintiffs and Cross-Defendants. Here, the Plaintiffs and Cross-Defendants presented a prima facia case establishing their possessory interest to each and all of the Ironcloud, Jennifer, Native American and R&R claims. Thus, the issue of who-did-what-to-whom would appear to be outside of the scope of the narrow issue of quieting title that was presented to this Court for consideration.

Dated: April 23, 1999,

/S_____
Larry L. Dier

Judge of the Superior Court

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APPENDIX H

Judgment For Permanent Injunction And Determining Right of Possession To Mining Claims, of the Superior Court of the State of California, In and for the County of Lassen

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ENDORSED-FILED
APRIL 28 1999
LASSEN COUNTY
SUPERIOR COURT
R. REED, CHIEF ADMIN.
OFFICER
By *Suzzane Faulkner* Deputy

IN THE CONSOLIDATED COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LASSEN

****

SYED M. ARIF, individually and dba NORTH AMERICAN TECHNICAL TRADING CO., and NORMAN F. RICE, an individual, Plaintiffs, v. EDWIN DURAND, an individual, and AMERICAN POZZOLAN CORP., Defendants.	CASE NO. 29224 JUDGMENT FOR PERMANENT INJUNCTION AND DETERMINING RIGHT OF POSSESSION TO MINING CLAIMS
EDWIN DURAND, an Individual, and AMERICAN POZZOLAN CORP., Counterclaimants, v.	

SYED M. ARIF, Individually and dba NORTH AMERICAN TECHNICAL TRADING CO., aka MATTCO and NORTH AMERICAN TECHNICAL TRADING CO. (INC. of ILLINOIS, 11-26-96 and of CALIFORNIA 1-17-97), and NORMAN F. RICE, GLORIA M. RICE, CLIFFORD S. RICE; individually and dba NORMAN RICE ENTERPRISES, INC.,

a Nevada corporation 12-18-96, and Agent Mr. ARTHUR KOFFINKE, an individual; JERRY W. SLUSSER, an individual; dba VALTEC CAPITAL CORPORATION & EARTHCO, both Nevada corporations (California & Indiana Registered); JOAN K. SCHUG, Treasurer; ARCHIE ALBRIGHT, Secretary, of VALTEC; & BYRON BARTHOLF, an individual & California Licensed General Building Contractor dba BARTCO, ROBERT R. SWINNEY, an individual, JAMES W. SCOTT, an individual aka J. W. SCOTT COMPANY, INC., a Nevada Corporation, MATTHEW G. HUNTELY, ESQ.; and ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE MINING CLAIMS PROPERTY DESCRIBED AS THE SIERRA LADY ASSOCIATED PLACER MINING CLAIMS ADVERSE TO THE CROSS-COMPLAINANTS TITLE and DOES 1-100. ,Cross-Defendants.

This cause came on regularly for trial without jury in November, 1998, the Honorable Larry L. Dier, Judge, presiding. Plaintiffs and Cross-Defendants, Syed M. Arif, North American Technical Trading Co, an Illinois corporation, Norman F. Rice, Gloria M. Rice, Clifford S. Rice, Norman Rice Enterprises, Inc., a Nevada corporation, and Matthew Huntley, appeared by Craig M. Kellison, counsel; Defendants Edwin Durand and Madelaine Durand, husband and wife, and American Pozzolan Corp., a Nevada corporation, appeared in propria person; and Cross-Defendants Jerry W. Slusser, Valtec Capital Corporation, a Nevada corporation, and Earthco, a Nevada corporation, appeared by Mark Davis, counsel. Oral and documentary evidence was presented by all parties; the cause was argued and submitted for a decision. A Statement of Decision has been requested.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that:

1. As of April 1, 1999, Plaintiff and Cross-Defendant Syed M. Arif [Arif] was and is the sole owner of the following mining claims.

Claim Name CAMC	Section	Description	Townsp	Range	BLM#
I.C. 1	1	N ½ NE ¼	23N	17E	232333
I.C. 2	1	SE ¼ NE ¼	23N	17E	232334
I.C. 3	1	E ½ SE ¼	23N	17E	232335
I.C. 4	1	N ½ SW ¼	23N	17E	232336
I.C. 6	12	NE ¼	23N	17E	232338
I.C. 7	12	NE ¼ NW ¼	23N	17E	232339
I.C. 8	12	S ½ NW ¼	23N	17E	232340
I.C. 9	12	SE ¼	23N	17E	232341
I.C. 10	12	SW ¼	23N	17E	232342
I.C. 15	1	N ½ NE ¼	23N	17E	232347
I.C. 16	13	NW ¼	23N	17E	232348
I.C. 17	13	SE ¼	23N	17E	232349
I.C. 18	13	SW ¼	23N	17E	232350
I.C. 19	14	S ½ NE ¼	23N	17E	232351
I.C. 20	14	E ½ SE ¼	23N	17E	232352
I.C. 28	24	NE ¼	23N	17E	232360
I.C. 29	24	NW ¼	23N	17E	232361
I.C. 30	24	SE ¼	23N	17E	232362
I.C. 31	24	SW ¼	23N	17E	232363
I.C. 42	25	NE ¼	23N	17E	232374
I.C. 43	25	N ½ SE ½	23N	17E	232375
I.C. 44	25	SE ¼ SE ¼	23N	17E	232376
I.C. 45	25	NW ¼	23N	17E	232377
N.A. 1	1	S ½ SW ¼	23N	17E	252914

N.A. 2	2	SW ¼ SE ¼	23N	17E	252915
N.A. 3	11	N½NE½NE¼	23N	17E	252916
N.A. 4	12	NW¼NW¼	23N	17E	252917
N.A. 5	11	SE ¼ NE ¼	23N	17E	252918
N.A. 6	11	E ½ SE ¼	23N	17E	252919
N.A. 7	14	NE¼NW¼	23N	17E	252920
N.A. 8	14	N ½ NE ¼	23N	17E	252921
R&R 1	31	NW ¼	24N	18E	52652
R&R 2	31	NE ¼	24N	18E	52653
R&R 3	31	SW ¼	24N	18E	52654
R&R 4	31	SE ¼	24N	18E	52655
R&R 5	6	NW ¼	23N	18E	52656
R&R 6	6	NE ¼	23N	18E	52657
R&R 7	6	SW ¼	23N	18E	52658
R&R 8	6	SE ¼	23N	18E	52659
R&R 9	7	NW ¼	23N	18E	52660
R&R 10	7	SW ¼	23N	18E	52662
R&R 11	18	NW ¼	23N	18E	52662
R&R 13	18	SW ¼	23N	18E	52663
R&R 15	19	NW ¼	23N	18E	52664
R&R 17	19	SW ¼	23N	18E	52665
R&R 19	30	NW ¼	23N	18E	52666
R&R 20	30	SW ¼	23N	18E	52667
R&R 21	31	NW ¼	23N	18E	52668
R&R 22	31	SW ¼	23N	18E	52669
R&R 23	6	NW ¼	22N	18E	52670
R&R 24	6	SW ¼	22N	18E	52671
R&R 25	7	NE ¼	23N	18E	52672
R&R 26	7	SE ¼	23N	18E	52673

2. As of April 1, 1999, Cross-Defendant Earthco was and is the sole owner of the following unpatented mining claims.

Claim Name CAMC	Section	Description	Townsp	Range	BLM#
I.C. 5	2	SE¼SE¼	23N	17E	232337
I.C. 11	11	SW ¼ NE ¼	23N	17E	232343
I.C. 12	11	W½ SE ¼	23N	17E	232344
I.C.13	11	S½SW¼	23N	17E	232345
I.C. 14	10	SE ¼ SE ¼	23N	17E	232346
I.C. 21	14	W½NW¼	23N	17E	232353
I.C. 22	14	W½SW¼	23N	17E	232354
I.C. 23	14	SE¼SW¼	23N	17E	232355
I.C. 24	15	SE¼NE¼	23N	17E	232356
I.C. 25	15	E½SE¼	23N	17E	232357
I.C. 26	15	SE½NW¼	23N	17E	232358
I.C. 27	15	SW¼	23N	17E	232359
I.C. 32	23	SW¼NE¼	23N	17E	232364
I.C. 33	23	NW¼SE¼	23N	17E	232365
I.C. 34	23	S½SE¼	23N	17E	232366
I.C. 35	23	NW¼	23N	17E	232367
I.C. 36	23	SW¼	23N	17E	232368
I.C. 37	22	NE¼NE¼	23N	17E	232369
I.C. 38	22	S½NE¼	23N	17E	232370
I.C. 39	22	NW¼	23N	17E	232371
I.C. 40	22	SE¼	23N	17E	232372
I.C. 41	22	SW¼	23N	17E	232373
I.C. 46	26	N½NE¼	23N	17E	232378
I.C. 47	26	SW½NE¼	23N	17E	232379
I.C. 48	26	W½SE¼	23N	17E	232380
I.C. 49	26	NW¼	23N	17E	232381
I.C. 50	26	SW¼	23N	17E	232382
I.C. 51	27	NE¼	23N	17E	232383
I.C. 52	27	SE¼	23N	17E	232384
I.C. 53	27	N¼	23N	17E	232385
I.C. 54	27	N½SW¼	23N	17E	232386

I.C. 55	27	SE¼SW¼	23N	17E	232387
I.C. 56	35	NE¼	23N	17E	232388
I.C. 57	35	NW¼	23N	17E	232388
I.C. 58	35	SE¼	23N	17E	232390
I.C. 59	35	SW¼	23N	17E	232391
I.C. 60	34	NE¼	23N	17E	232392
I.C. 61	34	E½NW¼	23N	17E	232393
I.C. 62	34	NE¼SW¼	23N	17E	232394
I.C. 63	34	N½SE¼	23N	17E	232395
I.C. 64	34	SE¼SE¼	23N	17E	232396
Jennifer 1	2	SW¼NW¼	23N	17E	249712
Jennifer 2	2	NW¼SW¼	23N	17E	249713
Jennifer 3	10	NW¼SW¼	23N	17E	249714
Jennifer 4	21	NE¼NE¼	23N	17N	249715
Jennifer 5	21	S½NE¼	23N	17E	249716
Jennifer 6	21	N½SW¼	23N	17E	249717
Jennifer 7	21	SE¼SE¼	23N	17E	249718
Jennifer 8	28	E½NE¼	23N	17E	249719
Jennifer 9	28	NE¼SE¼	23N	17E	249720
Jennifer 10	23	E½NE¼	23N	17E	249721
Jennifer 11	3	E½SE¼	23N	17E	249722
Jennifer 12	2	NW¼	22N	17E	249723
Jennifer 13	2	NE¼	22N	17E	249724
Jennifer 14	2	SW¼	22N	17E	249725
Jennifer 15	2	SE¼	22N	17E	249726
Jennifer 16	1	NW¼	22N	17E	249727
Jennifer 17	1	NE¼	22N	17E	249728
Jennifer 18	1	SW¼	22N	17E	249729
Jennifer 19	1	SE¼	22N	17E	249730

3. As of April 1, 1999, Defendants Edwin Durand and Madelaine Durand, husband and wife, were and are the sole owners of the following unpatented mining claims:

Claim Name CAMC	Section	Description	Townsp	Range	BLM#
S. Lady 164	23	*SE¼SE½	23N	17E	261331
S. Lady 165	26	*NE¼NE¼	23N	17E	26132

*Lying to the East of U.S. Highway 395

4. That as an owner to said unpatented mining claims, Arif possesses the following "possessory interest" to the following portions of real property located in an unincorporated area of Lassen County, California.

Section	Description	Township	Range
1	N½NE¼	23N	17E
1	SE¼NE¼	23N	17E
1	E½SE¼	23N	17E
1	N½SW¼	23N	17E
12	NE¼NW¼	23N	17E
12	S½NW¼	23N	17E
12	SE¼	23N	17E
12	SW¼	23N	17E
1	N½NE¼	23N	17E
13	NW¼	23N	17E
13	SE¼	23N	17E
13	SW¼	23N	17E
14	S½NE¼	23N	17E
14	E½SE¼	23N	17E
24	NE¼	23N	17E
24	NW¼	23N	17E
24	SE¼	23N	17E
24	SW¼	23N	17E
25	NE¼	23N	17E
25	N½SE½	23N	17E

25	SE¼SE¼	23N	17E
25	NW¼	23N	17E
1	S½SW¼	23N	17E
2	SW¼SE¼	23N	17E
12	NW¼NW¼	23N	17E
11	SE¼NE¼	23N	17E
11	E½SE¼	23N	17E
14	NE¼NW¼	23N	17E
14	N½NE¼	23N	17E
31	NW¼	24N	18E
31	NE¼	24N	18E
31	SW¼	24N	18E
31	SE¼	24N	18E
6	NW¼	23N	18E
6	NE¼	23N	18E
6	SW¼	23N	18E
6	SE¼	23N	18E
7	NW¼	23N	18E
7	SW¼	23N	18E
18	NW¼	23N	18E
18	SW¼	23N	18E
19	NW¼	23N	18E
19	SW¼	23N	18E
30	NW¼	23N	18E
30	SW¼	23N	18E
31	NW¼	23N	18E
31	SW¼	23N	18E
6	NW¼	22N	18E
6	SW¼	22N	18E
7	NE¼	23N	18E
7	SE¼	23N	18E

5. That as an owner to said unpatented mining claims, Earthco possesses the following "possessory interest" to the following portions of real property located in an

unincorporated area of Lassen County, California

Claim Name CAMC	Section	Description	Townsp	Range	BLM#
I.C. 5	2	SE¼SE¼	23N	17E	232337
I.C. 11	11	SW ¼ NE ¼	23N	17E	232343
I.C. 12	11	W½ SE ¼	23N	17E	232344
I.C.13	11	S½SW¼	23N	17E	232345
I.C. 14	10	SE ¼ SE ¼	23N	17E	232346
I.C. 21	14	W½NW¼	23N	17E	232353
I.C. 22	14	W½SW¼	23N	17E	232354
I.C. 23	14	SE¼SW¼	23N	17E	232355
I.C. 24	15	SE¼NE¼	23N	17E	232356
I.C. 25	15	E½SE¼	23N	17E	232357
I.C. 26	15	SE½NW¼	23N	17E	232358
I.C. 27	15	SW¼	23N	17E	232359
I.C. 32	23	SW¼NE¼	23N	17E	232364
I.C. 33	23	NW¼SE¼	23N	17E	232365
I.C. 34	23	S½SE¼	23N	17E	232366
I.C. 35	23	NW¼	23N	17E	232367
I.C. 36	23	SW¼	23N	17E	232368
I.C. 37	22	NE¼NE¼	23N	17E	232369
I.C. 38	22	S½NE¼	23N	17E	232370
I.C. 39	22	NW¼	23N	17E	232371
I.C. 40	22	SE¼	23N	17E	232372
I.C. 41	22	SW¼	23N	17E	232373
I.C. 46	26	N½NE¼	23N	17E	232378
I.C. 47	26	SW½NE¼	23N	17E	232379
I.C. 48	26	W½SE¼	23N	17E	232380
I.C. 49	26	NW¼	23N	17E	232381
I.C. 50	26	SW¼	23N	17E	232382
I.C. 51	27	NE¼	23N	17E	232383
I.C. 52	27	SE¼	23N	17E	232384

I.C. 53	27	N¼	23N	17E	232385
I.C. 54	27	N½SW¼	23N	17E	232386
I.C. 55	27	SE¼SW¼	23N	17E	232387
I.C. 56	35	NE¼	23N	17E	232388
I.C. 57	35	NW¼	23N	17E	232388
I.C. 58	35	SE¼	23N	17E	232390
I.C. 59	35	SW¼	23N	17E	232391
I.C. 60	34	NE¼	23N	17E	232392
I.C. 61	34	E½NW¼	23N	17E	232393
I.C. 62	34	NE¼SW¼	23N	17E	232394
I.C. 63	34	N½SE¼	23N	17E	232395
I.C. 64	34	SE¼SE¼	23N	17E	232396
Jennifer 1	2	SW¼NW¼	23N	17E	249712
Jennifer 2	2	NW¼SW¼	23N	17E	249713
Jennifer 3	10	NW¼SW¼	23N	17E	249714
Jennifer 4	21	NE¼NE¼	23N	17N	249715
Jennifer 5	21	S½NE¼	23N	17E	249716
Jennifer 6	21	N½SW¼	23N	17E	249717
Jennifer 7	21	SE¼SE¼	23N	17E	249718
Jennifer 8	28	E½NE¼	23N	17E	249719
Jennifer 9	28	NE¼SE¼	23N	17E	249720
Jennifer 10	23	E½NE¼	23N	17E	249721
Jennifer 11	3	E½SE¼	23N	17E	249722
Jennifer 12	2	NW¼	22N	17E	249723
Jennifer 13	2	NE¼	22N	17E	249724
Jennifer 14	2	SW¼	22N	17E	249725
Jennifer 15	2	SE¼	22N	17E	249726
Jennifer 16	1	NW¼	22N	17E	249727
Jennifer 17	1	NE¼	22N	17E	249728
Jennifer 18	1	SW¼	22N	17E	249729
Jennifer 19	1	SE¼	22N	17E	249730

6. That as an owner to said unpatented mining claims, Edwin Durand and Madelaine Durand, husband and wife, possess the following "possessory interest" to the

following portions of real property located in an unincorporated area of Lassen County.

Section	Description	Township	Range
23	SE¼SE½	23N	17E
26	NE¼NE¼	23N	17E

7. That the Defendants and Cross-Complainants, Edwin Durand and Madelaine Durand, husband and wife, and American Pozzolan Corp., a Nevada corporation, collectively referred to herein as "Durand," have no right, title or interest, including and possessory interest in and to those claims described in Paragraphs 1 and 2, above, or to those portions of real property described in Paragraphs 4 and 5, above.

8. That so far as the Durand's possess any mining claims that are situated on any of the above portions of real property described in Paragraphs 4 and 5, above, said claims are of no affect and invalid as to the claims of Arif and Earthco. The Court determines that these claims are situated on lands subject to the previous location by Arif, and his predecessors in interest, and are of no further force and effect. Specifically, the Court finds the following Sierra Lady Claims are invalid.

Claim Name	CAMC-BLM#
Sierra Lady 144	261324
Sierra Lady 145	260378
Sierra Lady 147	261325
Sierra Lady 156	260378
Sierra Lady 157	261326
Sierra Lady 117	260377
Sierra Lady 104	260376

Sierra Lady 102	260375
Sierra Lady 101	260374
Sierra Lady 166	261333
Sierra Lady 165	261332
Sierra Lady 164	261331
Sierra Lady 161	261330
Sierra Lady 160	261329
Sierra Lady 159	261328
Sierra Lady 158	261327
Sierra Lady 136	261323
Sierra Lady 133	261322
Sierra Lady 129	261321
Sierra Lady 126	261320
Sierra Lady 123	261319
Sierra Lady 120	261318
Sierra Lady 116	261317
Sierra Lady 113	261316
Sierra Lady 109	261315
Sierra Lady 108	261314
Sierra Lady 107	261313
Sierra Lady 106	261312
Sierra Lady 105	261311
Sierra Lady 103	261310

9. The Court further finds that as of April 1, 1999, Arif is the sole owner in fee simple title to that certain real property located in an unincorporated area of Lassen County, California, and more specifically described in Exhibit "A."

IT IS HEREBY ORDERED that Edwin Durand, Madelaine Durand, American Pozzolan corp., a Nevada corporation, their agents, employees, officers, representatives, and all persons acting in concert or participating with said Defendants are permanently

enjoined and restrained from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, any of the following acts:

a) Entering, for whatever reason, the real property described in Exhibit "A" attached hereto;

b) Entering upon any or all of the mining claims described in Paragraphs 1 and 2 above, including, the real property comprising said claims described in Paragraphs 4 and 5.

The Defendants, Edward Durand, Madelaine Durand, husband and wife, and American Pozzolan Corp., a Nevada corporation, herein own or possess no right, title, estate, interest of lien, whatsoever, in any of the claims described in Paragraphs 2 and 3, above, and to the real property described in Paragraphs 4 and 5; and the real property described in Exhibit "A".

Plaintiffs and Cross-Defendants have and recover their costs to be recovered pursuant to Rule 870.

Dated: April 23, 1999.

s/_____

Larry L. Dier
Judge of the Superior Court

LEGAL DESCRIPTION

ALL THAT CERTAIN REAL PROPERTY SITUATE IN THE COUNTY OF LASSEN, STATE OF CALIFORNIA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

IN TOWNSHIP 24 NORTH, RANGE 17 EAST, MOUNT DIABLO MERIDIAN, ACCORDING TO THE OFFICIAL PLAT THEREOF.

SECTION 13: THE E ½ OF THE NW ¼ ; THE NE1/4 OF THE SW ¼; AND THE W1/2 OF THE E1/2.

EXCEPTING THEREFROM THE PARCEL DESCRIBED IN THE DEED TO THE STATE OF CALIFORNIA RECORDED MAY 3, 1968 IN BOOK 221 OF OFFICIAL RECORDS AT PAGE 378.

ALSO EXCEPTING THEREFROM A STRIP OF LAND, 100 FEET IN WIDTH, AS DESCRIBED IN THE JUDGEMENT OF CONNDEMNATION IN FAVOR OF CHARLES MORAN, ET AL., RECORDED FEBRUARY 8, 1888 IN BOOK F OF DEEDS AT PAGE 326.

ALSO EXCEPTING THEREFROM ALL THAT PORTION LYING WESTERLY OF THE EASTERLY OF THE WESTERLY LINE OF THE WESTERN PACIFIC RAILROAD AND THAT PORTION LYING EASTERLY OF THE WESTERLY LINE OF U.S. HIGHWAY 395, AS DESCRIBED IN THE DEED TO THE STATE OF CALIFORNIA RECORDED SEPTEMBER 22, 1933 IN BOOK 30 OF DEEDS AT PAGE 246.

SECTION 24: LOTS 2, 3, AND 4; THE W1/2 OF THE E1/2; THE E1/2 OF THE NW1/4; AND THE NE1/4 OF THE SW1/4.

EXHIBIT "A"

EXCEPTING THEREFROM A STRIP OF LAND, 100 FEET IN WIDTH, AS DESCRIBED IN THE JUDGEMENT OF CONNDEMNATION IN FAVOR OF CHARLES MORAN, ET AL., RECORDED FEBRUARY 8, 1888 IN BOOK F OF DEEDS AT PAGE 326.

ALSO EXCEPTING THEREFROM A STRIP OF LAND 100 FEET IN WIDTH AS DESCRIBED IN THE DEED TO WESTERN PACIFIC RAILWAY COMPANY RECORDED APRIL 10, 1905, IN BOOK P OF DEEDS AT PAGE 214.

ALSO EXCEPTING THEREFROM A STRIP OF LAND 200 FEET IN WIDTH AS DESCRIBED IN THE DEED TO WESTERN PACIFIC RAILWAY COMPANY RECORDED FEBRUARY 8, 1906, IN BOOK P OF DEEDS AT PAGE 632.

ALSO EXCEPTING THEREFROM PARCELS 1 AND 2 AS DESCRIBED IN THE DEED TO ERMIN J. MINTZ RECORDED SEPTEMBER 13, 1967, IN BOOK 216 OF OFFICIAL RECCORDS AT PAGE 472.

SECTION 25: LOTS 1, 2 ,3, AND 4; AND THE W1/2 OF THE SW1/4.

SECTION 26: THE S1/2 OF THE SE1/4

SECTION 34: THE E1/2 OF THE SE1/4; AND THE SW1/4 OF THE SE1/4.

EXCEPTING FROM THE NE1/4 OF THE SE1/4; AND THE SW1/4 OF THE SE1/4, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO FRED GALEPPI, RECORDED MAY 11, 1982, IN BOOK 401 OF OFFICIAL RECORDS, AT PAGE 521. **EXHIBIT "A"**

SECTION 35: THE W ½ OF THE SW1/4.

SECTION 36: THE SW1/4 OF THE NE1/4; THE SE1/4 OF THE NW1/4; THE E1/2 OF THE SW1/4; AND SW1/4 OF THE SW1/4.

EXCEPTING THEREFROM A STRIP OF LAND 150 FEET IN WIDTH AS DESCRIBED IN THE DEED TO WESTERN PACIFIC RAILWAY COMPANY RECORDED MARCH 18, 1905, IN BOOK P OF DEEDS AT PAGE 159.

IN TOWNSHIP 23 NORTH, RANGE 17 EAST, MOUNT DIABLO MERIDIAN, ACCORDING TO THE OFFICIAL PLAT THEREOF.

SECTION 1: LOTS 1 AND 2; THE S1/2 OF THE NW1/4; THE SW1/4 OF THE NE1/4; THE W1/2 OF THE SE1/4; AND THE S1/2 OF THE SW1/4.

EXCEPTING THEREFROM THE PARCEL DESCRIBED IN THE DEED OF THE STATE OF CALIFORNIA, RECORDED SEPTEMBER 4, 1926, IN BOOK 18 OF DEEDS, AT PAGE 189.

ALSO EXCEPTING THEREFROM THE PARCEL SESCRIBED IN THE DEED TO THE STATE OF CALIFORNIA RECORDED AUGUST 10, 1992 IN BOOK 560 AT PAGE 500 OF OFFICIAL RECORDS.

ALSO EXCEPTING FROM THE S1/2 OF THE SW1/4, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PPATENT FROM THE UNITED STATES OF AMERICA TO CHARELS A. GALEPPI, RECORDED ...

EXHIBIT "A"

APRIL 7, 1941, IN BOOK 39 OF DEEDS, AT PAGE 472.

SECTION 2: LOTS 1, 2, 3, AND 4; THE SE1/4 OF THE NW1/4; THE S1/2 OF THE NE1/4; THE N1/2 OF THE SE1/4 OF THE SE1/4; THE SW1/4 OF THE SE1/4, THE E1/2 OF THE SW1/4; AND THE SW1/4 OF THE SW1/4.

EXEPTING FROM THE SW1/4 OF THE SW1/4, ALL THAT PORTION THEREOF LYING SOUTHERLY AND EASTERLY OF THE NORTHWESTERLY LINE OF THE STRIP OF LAND 100 FEET IN WIDTH CONVEYED TO WESTERN PACIFIC RAILWAY COMPANY BY DEED RECORDED JUNE 6, 1905, IN BOOK P OF DEEDS, AT PAGE 341.

EXCEPTING FROM THE SW1/4 OF THE SE1/4, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO CHARLES A. GALEPPI, RECORDED APRIL 7, 1941, IN BOOK 39 OF DEEDS, AT PAGE 472.

ALSO EXCEPTING THEREFROM THE PARCEL DESCRIBED IN THE DEED TO THE STATE OF CALIFORNIA, RECORDED AUGUST 10, 1992 IN BOOK 560 AT PAGE 500 OF OFFICIAL RECORDS.

SECTION 3: LOTS 1 AND 2; THE S1/2 OF THE NE1/4; AND THE SE1/4.

EXHIBIT "A"

EXCEPTING FROM LOT 2, THE SE1/4 OF THE NE1/4; AND THE S1/2 OF THE SE1/4, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO CHARLES A. GALEPPI, RECORDED MAY 11, 1982, IN BOOK 401 OF OFFICIAL RECORDS, AT PAGE 521.

SECTION 10: THE N1/2 OF THE NE1/4.

EXCEPTING THEREFROM, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO CHARLES A. GALEPPI, RECORDED MAY 11, 1982, IN BOOK 401 OF OFFICIAL RECORDS, AT PAGE 521.

SECTION 11; THE E1/2 OF THE E1/2; AND THE NW1/4 OF THE NE1/4.

EXCEPTING THEREFROM, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO CHARLES A. GALEPPI, RECORDED APRIL 7, 1941, IN BOOK 39 OF DEEDS, AT PAGE 472.

ALSO EXCEPTING THEREFROM THE PARCEL DESCRIBED IN THE DEED TO THE STATE OF CALIFORNIA, RECORDED AUGUST 31, 1941, IN BOOK 40 OF DEEDS, AT PAGE 160.

EXHIBIT "A"

ALSO EXCEPTING THEREFROM THE PARCEL DESCRIBED IN THE DEED TO THE STATE OF CALIFORNIA, RECORDED AUGUST 10, 1992 IN BOOK 560 AT PAGE 500 OF OFFICIAL RECORDS.

SECTION 12: THE NW1/4 OF THE NW1/4.

EXCEPTING THEREFROM, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO CHARLES A. GALEPPI, RECORDED APRIL 7, 1941, IN BOOK 39 OF DEEDS AT PAGE 472.

SECTION 14: THE N1/2 OF THE NE1/4; THE E1/2 OF THE NW1/4; THE NE1/4 OF THE SW1/4; AND THE W1/2 OF THE SE1/4.

ALSO EXCEPTING THEREFROM THE PARCEL DESCRIBED IN THE DEED TO THE STATE OF CALIFORNIA, RECORDED AUGUST 10, 1992, IN BOOK 560 AT PAGE 500 OF OFFICIAL RECORDS.

EXCEPTING FOR THE N1/2 OF THE NE1/4; AND THE NE1/4 OF THE NW1/2, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO CHARLES A. GALEPPI, RECORDED APRIL 7, 1941, IN BOOK 39 OF DEEDS, AT PAGE 472.

SECTION 15: THE SW1/4 OF THE NE1/4; AND THE W1/2 OF THE SE1/4.

EXHIBIT "A"

EXCEPTING THEREFROM, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO CHARLES A. GALEPPI, RECORDED MAY 11, 1982, IN BOOK 401 OF OFFICIAL RECORDS, AT PAGE 527.

SECTION 22: THE NW1/4 OF THE NE1/4.

EXCEPTING THEREFROM, ALL THE COAL AND OTHER MINERALS IN SAID LANDS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE THE SAME AS CONTAINED IN THE PATENT FROM THE UNITED STATES OF AMERICA TO THE HEIRS OF ARTHUR PAUL PENSA, RECORDED MAY 11, 1982, IN BOOK 401 OF OFFICIAL RECORDS, AT PAGE 527.

END

EXHIBIT "A"

APPENDIX I

Statutes in part: U.S. Code, U.S. Constitution, California Penal Code, California Code of Civil Procedure, California Business and Professions Code

United States Code Title 28, Part IV, Chapter 85, Section 1331. Federal question. The district courts shall have original jurisdiction of all civil actions arising under the constitution, law, or treaties of the United States.

United States Code, Title 28, Part IV, Chapter 89, Section 1441(b). Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

United States Constitution Article III, Section 2. (In relevant part.) The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

Penal Code Sec. 132. "OFFERING FALSE EVIDENCE. Every person who upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or ante-dated, is guilty of felony."

Penal Code Sec. 134. "PREPARING FALSE EVIDENCE. Every person guilty of preparing any false or ante-dated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

Penal Code Sec. 118a. Any person who, in any affidavit

taken before any person authorized to administer oaths, swears, affirms, declares, deposes, or certifies that he will testify, declare, depose, or certify before any competent tribunal, officer, or person, in any case then pending or thereafter to be instituted, in any particular manner, or to any particular fact, and in such affidavit willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury. In any prosecution under this section, the subsequent testimony of such person, in any action involving the matters in such affidavit contained, which is contrary to any of the matters in such affidavit contained, shall be prima facie evidence that the matters in such affidavit were false.

Penal Code Sec. 119. The term "oath, " as used in the last two sections, includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated.

Penal Code Sec. 124. The making of a deposition, affidavit or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true.

Penal Code Sec. 126. Perjury is punishable by imprisonment in the state prison for two, three or four years.

Penal Code Sec. 129. Every person who, being required by law to make any return, statement, or report, under oath, willfully makes and delivers any such return, statement, or report, purporting to be under oath, knowing the same to be false in any particular, is guilty of perjury, whether such oath was in fact taken or not.

Code of Civil Procedure Sec. 473(d). The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

Code of Civil Procedure Sec. 473(b). The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit of declaration

of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

Code of Civil Procedure Sec. 592. In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury , unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code.

Code of Civil Procedure Sec. 128.5. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that

are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics' for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) In addition to any award pursuant to this section for conduct described in subdivision (a), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

Code of Civil Procedure Sec. 128.6. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics' for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) In addition to any award pursuant to this section for conduct described in subdivision (a), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

(f) This section shall become operative on January 1, 2003, unless a statute that becomes effective on or before this date extends or deletes the repeal date of Section 128.7.

Code of Civil Procedure 128.7. (a) Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise provided by law, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

(1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable

opportunity for further investigation or discovery.

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence.

(1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 30 days after service of the motion, or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(2) On its own motion, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b), unless, within 30 days of service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately

corrected.

(d) A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (1) and (2), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(1) Monetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b).

(2) Monetary sanctions may not be awarded on the court's motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(e) When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.

(f) In addition to any award pursuant to this section for conduct described in subdivision (b), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(g) This section shall not apply to disclosures and discovery requests, responses, objections, and motions.

(h) A motion for sanctions brought by a party or a

party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter such improper conduct or comparable conduct by others similarly situated.

(i) This section shall apply to a complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in such a matter.

(j) This sections shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Business and Professions Code Sec. 6068. It is the duty of an attorney to do all of the following:

(a) To support the Constitution and law of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the

justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

Business and Professions Code Sec. 6106. The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

Code of Civil Procedure Sec. 1033.5. Items allowable, in pertinent part: (b) The following items are not allowable as costs, except when expressly authorized by law:

(1) Fees of experts not ordered by the court.